**Ridgeview Industries, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO *and* Glenn Gentz.** Cases 7–CA–50170, 7–CA–50260, 7–CA–50383, 7–CA–50887 and 7–CA–50281

March 25, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On October 27, 2008, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ridgeview Industries, Inc., Walker, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly.

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

It is unclear whether the Respondent has excepted to the judge's finding that it violated Sec. 8(a)(3) of the Act by imposing a job jeopardy agreement on employee Dave Smith. We note, however, that to the extent that the Respondent may have done so, its exceptions regarding Smith were based solely on the judge's credibility resolutions.

There were no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by reprimanding employee Ben Balczak on January 26, 2007, and suspending him on February 2, 2007, and by restricting Smith's movement within its plants on January 16 and 24, 2007. There were no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by: creating the impression of surveillance; restricting employee movement in its plants; promulgating, maintaining, or enforcing rules prohibiting the posting of materials containing union/nonunion arguments or information on employee bulletin boards, or removing such postings; promulgating, maintaining, or enforcing rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony, or unauthorized solicitation of funds or distribution of literature on the Respondent's property; and soliciting employees to report on the union activities of other employees and implicitly threatening to discipline employees engaged in such activities. There were also no exceptions to the judge's findings that the Respondent did not unlawfully solicit grievances and implicitly promise remedies in a February 21, 2007 letter to employees, and that it did not unlawfully assign Balczak to press operator duties on February 8, 2007.

[3] Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Respondent violated Sec. 8(a)(3) and (1) by reprimanding Balczak and Glenn Gentz, by discharging Gentz, and by imposing a job jeopardy agreement on Smith. In adopting the judge's finding that Gentz' discharge was unlawful, we rely particularly on the evidence of disparate treatment, i.e., that Gentz' discharge was disparate to discipline the Respondent imposed on other employees for similar conduct. Member Schaumber finds it unnecessary to pass on the judge's other reasons for finding the violation.

To establish a violation under *Wright Line*, the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007); *Desert Springs Hospital Medical Center*, 352 NLRB 112 (2008). Member Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Member Schaumber agrees with this addition to the formulation. In this case, he finds a causal nexus between the Respondent's union animus and the reprimands and/or discharges of the discriminatees.

Member Schaumber does not rely on any implication in the judge's decision that the Respondent's public statements in opposition to the union campaign necessarily evidenced "antiunion animus." Opposition to unionization is not unlawful. See, e.g., *ATC/Forsythe & Associates*, 341 NLRB 501, 502 fn. 5 (2004). Instead, Member Schaumber relies on the Respondent's numerous 8(a)(1) violations as evidence of animus. Chairman Liebman agrees that the evidence on which Member Schaumber relies is sufficient to establish that the Respondent acted with an unlawful motive with respect to its violations of Sec. 8(a)(3). She concurs with the judge's grounds for finding antiunion animus, and she observes that the Respondent's exceptions do not, in any case, appear to challenge this finding.

[4] We shall modify the judge's proposed Order to require immediate rescission or modification of the Respondent's unlawful rules. We shall also revise the notice to reflect the violations found.

"(a) Rescind the rule prohibiting employees from posting materials containing union/nonunion arguments or information on employee bulletin boards, and notify employees in writing that this has been done and that the rule is no longer in force.

"(b) Rescind the overly broad rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony, or unauthorized soliciting of funds or distributing literature on company property, and notify employees in writing that this has been done and that the rules are no longer in force."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 25, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT impose new restrictions on employee movement in our plants in response to employee union activity.

WE WILL NOT discriminatorily promulgate, maintain, or enforce rules prohibiting employees from posting notices, letters, or other nonthreatening materials pertaining to union or protected concerted activities on the plant bulletin boards that are available for other employee uses.

WE WILL NOT promulgate, maintain, or enforce rules against employees (1) engaging in behavior designed to create discord or lack of harmony, or (2) soliciting during nonworktime such as breaks or before or after their shifts, or (3) distributing literature in nonwork areas during nonworktimes.

WE WILL NOT solicit employees to report to management the union activities of other employees, or threaten to discipline employees engaged in the activities.

WE WILL NOT discharge employees, or issue disciplinary warnings, reprimands, suspensions, job jeopardy agreements, or other forms of discipline, or restrict movement in our plants because of employees' union activities, or because we suspected that they engaged in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, or discriminate against them in order to discourage membership in a union, or activities on behalf of a union.

WE WILL rescind the rule prohibiting employees from posting materials containing union/nonunion arguments or information on employee bulletin boards, and WE WILL notify employees in writing that this has been done and that the rule is no longer in force.

WE WILL rescind the overly broad rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony, or unauthorized soliciting of funds or distributing literature on company property, and WE WILL notify employees in writing that this has been done and that the rules are no longer in force.

WE WILL, within 14 days from the date of the order, offer Glenn Gentz full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Glenn Gentz, Ben Balczak, and Dave Smith whole for any loss of earnings and other benefits resulting from our discrimination against them, less any interim earnings, plus interest.

WE WILL reimburse Dave Smith for out-of-pocket costs he incurred as a result of our discriminatory imposition of a job jeopardy agreement, with interest.

WE WILL, within 14 days from the date of this order, rescind the unlawful disciplinary warnings and suspension issued to Ben Balczak, the unlawful job jeopardy agreement imposed on Dave Smith, and the unlawful disciplinary warning and discharge of Glenn Gentz, remove any references to such in our files, and WE WILL, within 3 days thereafter, notify Balczak, Smith, and Gentz in writing that this has been done, and that the discipline will not be used against them in any way.

RIDGEVIEW INDUSTRIES, INC.

*Colleen J. Carol, Esq.,* for the General Counsel.
*Jeffrey J. Fraser, Esq.* and *Kelley E. Stoppels, Esq. (Varnum, Riddering, Schmidt & Howlett),* of Grand Rapids, Michigan, for the Respondent.
*Kenneth Bieber,* of Grand Rapids, Michigan, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on April 23, and June 3–6, 2008, based on charges and amended charges filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (Charging Party Union or the Union) on February 22, June 13, April 4, May 17 and 22, June 18, and November 28, 2007, and January 10, 2008, and by Glenn Gentz (Charging Party Gentz) on April 13 and May 22, 2007.

The Regional Director's consolidated amended complaint, dated February 28, 2008, alleges that the Respondent violated Section 8(a)(3) by issuing written reprimands/warnings and a 3-day disciplinary suspension to Ben Balczak, by changing Balczak's work assignment to press operator duties, by issuing a written reprimand/warning to Charging Party Gentz, by discharging Gentz, and by requiring that Dave Smith enter a "Job Jeopardy Agreement (JJA)."

The complaint further alleges that the Respondent violated Section 8(a)(1) by creating the impression that its employees' union activities were under surveillance, by imposing restrictions on employee movement, by prohibiting an employee from discussing terms and conditions of employment with another employee, by prohibiting postings as to "union/nonunion" arguments on employee bulletin boards and removing such postings, by maintaining rules in its employee manual prohibiting certain conduct asserted as protected by Section 7, by soliciting employee grievances with an implied promise of remedy, by soliciting employees to report to management as to the union activities of other employees and threatening discipline for such activities, and by threatening employees with discharge for engaging in activities in support of the Union. The Respondent asserts that its actions alleged as violating Section 8(a)(3) were engaged in for legitimate reasons unrelated to the Union or union activities, and that none of its actions, alleged as violations of Section 8(a)(1), interfered with, coerced, or restrained employees in the exercise of their Section 7 rights.

At the trial, the parties were afforded a full opportunity to examine and cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file posttrial briefs. Based on the entire record, including my observation of witness demeanor, and after considering the briefs of the Respondent and the General Counsel, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent maintains corporate offices and a factory in Walker, Michigan (Northridge plant), and a second factory in Walker (Three Mile plant).[1] At these facilities, the Respondent is engaged in the manufacture, nonretail sale, and distribution of metal stampings, metal components, weldments, and assemblies for the automotive, furniture, and other industries, and in the course of such during the calendar year ending December 31, 2006, a representative period, sold and shipped products valued in excess of $50,000 directly to points located outside the State of Michigan.[2] I, thus, find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

I find, and it is admitted, that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.[3]

#### III. ALLEGED UNFAIR LABOR PRACTICES

##### The Respondent

The Respondent operates two plants in Walker, Michigan, outside Grand Rapids, and a plant in Huntsville, Alabama, not involved in this litigation. About 200 production, shipping, and office employees work at the Northridge plant, which also serves as the Respondent's headquarters. The Respondent's top managers are housed in Northridge offices, including owner and President Dave Nykamp, Vice President of Operations Doug Dykstra, Human Resource Manager Terri Yeomans, and Northridge Plant Manager Ron VanderLaan. Plant Manager Paul MacLaren oversees the Respondent's 150 employees at the Three Mile plant, located about 3 miles from Northridge. Human Resources Generalist Brian Hirdes, reporting to Yeomans, maintains an office at Three Mile, and handles personnel functions there. Supervisor Fred Thomas supervises the shipping department at both facilities, and Nykamp and Yeomans occasionally visit Three Mile. Neither facility's employees are represented by a union. Absent other specific reference, the facts found herein reference Three Mile.

##### The Respondent's Disciplinary Policies

The Respondent's disciplinary policy is essentially set forth in its employee handbook,[4] under a section entitled, "Corrective

[1] The complaint pleads, and the answer admits, that the plants are located in Grand Rapids, Michigan. Record testimony is to the effect that the plants are located in nearby Walker, Michigan.
[2] Based on the parties' pleadings.
[3] Respondent so stipulated.

Action Policy." The handbook, unchanged from about 2006 to 2008, and in effect at all times material hereto, describes the disciplinary system as progressive and notes that the Respondent may skip one or more steps up to termination, depending on the circumstances and seriousness of the offense. The progressive discipline steps are as follows: first offense—verbal reprimand, documentation to personnel file that the conversation took place, and employee signature required; second offense—written reprimand, copy to personnel file, employee signature required; third offense—written reprimand, copy to personnel file, employee signature required, suspension for up to 3 days without pay; and fourth offense—written reprimand, copy to personnel file, employee signature required, and discharge. In addition to the formal steps of the progressive discipline policy, supervisors have the authority to verbally mention a problem to an employee with a note to the file. Such a "preverbal" discussion is not considered a step in the progressive discipline policy, although it could lead to a first-step warning in case of a repeat violation.

Also in addition to the steps listed in its progressive discipline policy, the Respondent utilizes a "job jeopardy agreement" (JJA) procedure which Yeomans described as a "last-chance agreement where the person is told what the issues with their performance or behavior are and then specific recommendations are made, typically counseling that they're asked to attend to help rectify the situation." Employees who are party to a JJA are subject to discharge unless they fulfill its terms. The Respondent utilizes JJAs for a variety of offenses including drug/alcohol test failures and attitude problems. Yeomans testified that JJAs are part of the Respondent's disciplinary policy and are typically used in lieu of the third offense step, as set forth above.

The employee handbook also contains a section entitled, "Employee Conduct in the Workplace," which sets forth specific examples of prohibited conduct which are subject to the Respondent's disciplinary policy, up to discharge. Two of the prohibitions are as follows: "Malicious gossip and/or spreading rumors; engaging in behavior designed to create discord or lack of harmony," and "Unauthorized soliciting of funds or distributing literature on company property."

### Other Policies

The Respondent's owner, Nykamp, regularly schedules "Donuts with Dave" meetings with employees. The Respondent schedules a date and time. Employees sign up to participate. At the meetings, the Respondent provides refreshments and employees are permitted to ask questions of Nykamp on various issues. Issues have included various programs of the Respondent, including the attendance program. Nykamp has been holding these meetings since about 2003.[5] Alleged discriminatee Dave Smith testified that employees are free to bring up any work-related subject at these meetings. Smith testified, "Somebody else may have talked to him about we need a new vending service and this is why. You could just talk about anything work related, improvements, the way people could improve or the way the company could improve." Smith testified that the meetings were a "two-way thing," with employees making suggestions and Nykamp responding.

### Union Organizational Activity

During October 2006, shipping employee Dave Smith and material handler Ben Balczak began talking about the possibility of acquiring union representation.[6] In November, Smith contacted the Charging Union, which resulted in a meeting with UAW organizer Ken Bieber in early December, a meeting also attended by Balczak and employee Bryan Bowman. A plan was formulated that the initial support for the Union would be demonstrated by Smith and Bryan Bowman, and that Balczak would stay behind the scenes to gauge the strength of employee support for the Union.

Subsequent to the meeting, Smith and Balczak spoke to other employees, including Glenn Gentz, in an attempt to gauge employee interest in a union, and to gather information helpful during an organization drive. After January 1, 2007, Smith, Balczak, and Bowman began wearing UAW insignia to work. Smith wore a UAW T-shirt to work every Thursday (payday), and a UAW pin other days. About February 15, at various times, Smith stood on the sidewalk by both plants and distributed union literature to employees at shift change. Balczak wore a UAW pin on his shirt beginning in late January or early February, and called other employees at home to promote the Union. Sometime in February 2007, Gentz asked Greg Penland, his former supervisor, what Penland thought about the Union and Penland responded that Nykamp did a lot for the employees and asked why would they want a union.[7]

In mid-December 2006, Human Resources Manager Yeomans noticed Three Mile employees Dave Weerstra and Ray Trujillo in the Northridge plant and asked them why they were there. One of them responded that they were going to a union organizing meeting. Yeomans contacted Plant Managers MacLaren and VanderLaan told them about the conversation, and added that it was "the first time I've heard the union word mentioned at Ridgeview, so just keep your ears open."

Yeomans also told owner Nykamp that there were "people encouraging union activity or union sign-up," and specifically mentioned the names Dave Smith and Ben Balczak.[8] Subsequently, Yeomans and Nykamp would speak when there were union activities or conversations. At the hearing, Nykamp testified that "we would discuss examples, again, of Dave Smith talked to so-and-so, or we have a flyer." The names of Smith and Balczak came up when the Respondent's managers discussed the latest union activity.[9] Nykamp testified that employees told him that Balczak and Smith were trying to organize a union and that more than 100 employees talked to him about union activity in January 2007, and then again in February. Among other items, some of these employees reported to

[4] GC Exh. 2 is the version of the handbook that was in effect at all times material hereto.

[5] Nykamp testified that he has been holding "Donuts with Dave" meetings for about 5 years.

[6] Other employees involved in such conversations during that period were Bryan Bowman, Ray Schoonmaker, Jack Johnson, and Ron McNab.

[7] The parties stipulated to Penland's 2(11) status.

[8] Nykamp's testimony.

[9] VanderLaan's testimony.

Nykamp the names of other employees who approached them about the Union. Because Nykamp's testimony as to how many employees spoke to him about the Union is an estimate, and is without substantiation as to the actual number, I find only that numerous employees spoke to him about the Union.

Responses to Organizational Campaign

The Respondent distributes its employee newsletter, "Newsbreak," each payday to employees with their paychecks. It generally includes articles prepared by the human relations department dealing with new employees, birthdays, events, benefits, and the like. The January 24, 2007 "Newsbreak" distributed to employees contained a letter to employees from Dave Nykamp, signed "Dave," and prepared by Nykamp, together with Yeomans, and with advice from the Respondent's attorney.[10]

The letter began, "I recently learned that several individuals are encouraging others to consider a union at RVI. I am writing to you to share my opinion about unions." The letter continued with a discussion of Nykamp's negative perceptions of the impact a union would have on the Respondent's business and concluded as follows: "RVI recognizes that employees have the right to join or not join a union. I believe each of you have the responsibility to decide for yourselves whether a union would serve our best interests. In case after case, union-employer relationships have proven to be adversarial and marked by conflict. Such an environment undermines employee participation and cooperation in the workplace, and limits a company's ability to compete. I strongly believe that union representation does not serve the best interests of the company or its employees."

Nykamp's letter also stated that if employees voted a union in, it was possible that, in bargaining, they would lose "many of our current benefits/perks." The letter specifically mentions the employee library as one of those benefits, among others.

About a week after the Nykamp letter was distributed, the Respondent held its regular quarterly employee meetings. Three Mile first-shift employees and some office employees attended the meeting in the recreation area of the Three Mile plant. Using a PowerPoint presentation illustrating union represented plants that had closed, Nykamp spoke to the assembled employees about his negative views of unions, that they've never needed a union before, and had been able to resolve any problems without a union.[11]

Most of the quarterly meeting was taken up with Nykamp's discussion of unions, so that much of what is normally discussed at quarterly meetings, such as performance measurables and the state of the business, was not touched on. As a result, the Respondent held a departmental employee meeting in mid-February so that the normal topics missed at the quarterly meetings could be discussed.

The departmental meeting, attended by first-shift hourly employees, lasted about 15 minutes, and was conducted in the recreation area, with the Respondent's vice president, Doug Dykstra, speaking, and HR Manager Yeomans present. For much of the meeting Dykstra discussed certain rules in the Respondent's employee handbook, including policies against gossip and the unauthorized distribution of materials and solicitation. Dykstra told employees that the penalty for violations would be up to termination.[12]

During the meeting, Dykstra used a PowerPoint presentation which displayed page 31 from the employee handbook entitled, "Employee Conduct in the Workplace." The page included the following as violations: "Malicious gossip and/or spreading rumors, engaging in behavior designed to create discord or lack of harmony," and "Unauthorized soliciting of funds or distributing literature on company property." The penalty provided for violations of the rules is as follows: "RVI imposes the appropriate corrective action (up to and including discharge), given the facts and circumstances of a particular situation."

On February 21, 2007, the Respondent distributed another Nykamp letter to employees, with their paychecks. The letter began, "In the January quarterly meetings, I discussed union organizing efforts at Ridgeview and my personal feeling that union representation is not the answer to resolving our issues or concerns at Ridgeview. I know that union efforts persist and I am aware that the United Auto Workers (UAW) held informational meetings for our employees over the past week. I continue to believe strongly that union representation will negatively impact our communications, our efforts to resolve problems together, and our ability to compete in a very challenging industry. I remain open to talking about this issue with any individual or group. I am eager to learn and understand the issues and to work toward an acceptable resolution. Please be willing to call me directly and ask for an opportunity to meet."

In the letter, Nykamp discusses union authorization cards as follows: "Throughout this process, you have the right to stand up for yourself and Ridgeview. If you don't want to sign a card, tell the person asking you that you have no interest in signing a card. If you feel pressured, coerced or harassed to sign a card, please report the issue. We enforce our policy prohibiting harassment of any kind."

Anonymous Flyer

In late January/early February 2007, an anonymous flyer or letter was posted and distributed at various places in the plant, and placed in MacLaren's office mailbox. The flyer, referred to in the record as the "list," states, verbatim: "PLEASE THANK THE FOLLOWING PEOPLE FOR THEIR GREAT CONCERN FOR OUR WELFARE BY SUGGESTING A UNION BE BROUGHT INTO OUR LIVES. DAVE SMITH, GLENN GENTZ, BOB BONNEVILLE, MIKE SEGERS, BEN BALCZAK, GLEN OCKERT, JACK JOHNSON [sic], JERRY CONALES, BRYAN BOWMAN AND ANY OTHERS THAT ARE NOT NAMED" [caps contained in original, type size approximates the original].

MacLaren told Dykstra about the list the day he received it and forwarded it to Yeomans. Dykstra asked MacLaren which employees were named on the list and MacLaren told him.[13] MacLaren discussed the flyer and the union activities with his

[10] Nykamp's testimony.
[11] Credited testimony of Smith.
[12] Both Smith and Yeomans testified as to this meeting. Their testimony does not materially differ.
[13] MacLaren's testimony.

production supervisory staff, including John Deering, Sherri Gray, Corey Falk, and Bob Dalloway. MacLaren asked his production supervisors "if they have heard anybody on the floor disgruntled with Ridgeview, if anything's going on that I need to be aware of . . . ."[14]

Shortly after seeing the list, MacLaren spoke with some employees named on the list. He told Smith that a list had been posted with his name on it and he wanted Smith to know that the list had been removed and destroyed.[15] MacLaren told Balczak that the Respondent was investigating the list posting. Balczak told MacLaren that he thought management was responsible because certain names on the list with unusual spellings were spelled correctly. MacLaren apologized to Gentz as to his name being on the list. MacLaren told Bonnville that a list had been posted with employees' names, that MacLaren was talking to people involved to let them know that the Respondent was aware of it, was going to "look into it and find out what was going on." Bonnville responded that his name was on the list, that he didn't know how it got there, that it didn't belong there, that he had never spoken with a union representative, that he had never attended a union meeting, and was not involved in any way. Other than speculation by witnesses, there is no definitive or substantive evidence in the record as to who actually produced or distributed the list.

Michael Segers, employed at Three Mile for about 8 years as an automatic press operator and named on the list, saw a copy of the list at Bonnville's workstation, although the posted list had been removed before his 6 a.m. shift had started. At about 7 a.m., Segers asked Human Resources Generalist Hirdes "What's going on with the list?" Segers told Hirdes that he knew nothing about a union. Hirdes responded that he was going to look into it, and would get back to Segers. Segers then approached MacLaren and asked him about the list. MacLaren responded that he didn't know anything about it, was looking into it, and would get back to Segers. Segers did not hear back from either Hirdes or MacLaren by the end of his shift. After work, Segers called Yeomans and then Nykamp, but was told they were both out of town. Segers then called Dykstra, and left a message requesting a meeting to discuss the list.

Within the next 2 days, at work, Dykstra told Segers that he was ready to meet with him. Segers requested that Bonnville be allowed to attend the meeting and Dykstra agreed. Bonnville and Segers then met with Dykstra and MacLaren in MacLaren's office.

Segers said they wanted to know who created the list, and why their names were on it.[16] Dykstra said, "You obviously were seen attending union meetings or talking up the union." Segers responded that he was not even aware of any union meetings and that he hadn't attended any. Segers mentioned an antiunion letter written by another employee and left at his workstation, and said, "This kind of stuff left at my workstation purposely for me, this is distracting." Dykstra responded that "[t]here's been a lot of distractions. We have to get back to what we do. It looks like people are just angry because either we are pushing back or others are pushing back." Dykstra added that "if people are not happy at Ridgeview, that maybe we should see what we can do to see that they're not working here or something" and that "people were going to have to earn back the trust." Segers asked why he had to earn back the trust and mentioned his years of employment with the Respondent and a commendation he had earned. Dykstra responded that "people were going to be on a tight leash" and that "we have to get back to business."

During the course of the meeting, Bonnville stated that he was unaware of any unions, hadn't attended any meetings, and his name did not belong on the list. Dykstra responded that he would like to believe that but couldn't, and that he'd seen a list of 35 to 38 people that had been attending union meetings. Bonnville said that he hadn't attended any union meetings. Dykstra responded that he hadn't really seen the list, but had heard about it. Bonnville said that the Respondent owed it to the people named on the list to investigate the list and put a stop to it. Dykstra responded that if the whole situation was "payback" for something that happened 4 years ago, they needed to get over it.[17] At some point during the meeting, Dykstra asked Bonnville and Segers whether they were part of the Union.[18]

Employee Posting of Letters and Response

Near the same date that the list was posted, employee Rob Twa posted a letter on an employee bulletin board opposing a union. The letter began, "Management of this company is not allowed to share their views on the union issue, BUT I CAN! If you think that a union is going to make your life at RVI better, maybe you should go ask the people at other union shops how they like their jobs." The letter concluded, "If you don't like it here, then LEAVE! Chances are pretty good that we didn't like you anyway. If you want to have everything your

[14] MacLaren's testimony.

[15] Smith's testimony.

[16] The finding of facts in respect to what occurred during this meeting is based on an amalgam of the testimony of Segers and Bonnville. Their testimony is not identical or inconsistent. Segers testified mostly about the portions of the meeting where he interacted with Dykstra, while Bonnville testified mostly about the portions of the meeting in which he exchanged conversation with Dykstra. Based on their testimonial demeanor, apparent recall of events, level of detail in their testimony, and willingness to answer the questions of both counsel, they both appeared to be credible witnesses. Dykstra did not testify. MacLaren's testimony did not include the level of detail testified to by both Bonnville and Segers. While he did not testify as to some of the comments made by Dykstra, which Bonnville and Segers testified to, he did not deny them either. Finally, both Segers and Bonnville are current employees who would not receive any direct benefit from the instant litigation. Both factors support their credibility.

[17] An apparent reference to Bonnville's prior demotion from a salaried to an hourly job.

[18] MacLaren so testified in response to a question from the Respondent's counsel. The Respondent's counsel asked, "Did Doug Dykstra ask them whether they were part of the union?" MacLaren answered, "As I think about it now, he did ask them that question." Dykstra did not testify. Neither Bonnville nor Segers testified that Dykstra asked such an explicit question when asked what occurred during the meeting, but they were not asked specifically whether or not Dykstra asked such a specific question and did not deny that he did such. Under these circumstances, I find that MacLaren's testimony as to this to be reliable as he would have no incentive to be untruthful here.

way then go work for BURGER KING!" (Emphasis in original.) In addition to Twa, other employees signed the letter.

About the day after the Twa letter was posted, employee Bob Keeler posted a letter supportive of the Union on an employee bulletin board. Keeler's letter began, "The management of this company is a lot smarter than you are. That is why they don't share their view on this union issue. You Mr. Twa on the other hand stand up and get in peoples faces and tell them if they don't like it here to leave; and that they are a threat to your financial security."

Shortly after the Keeler letter posted, HR Manager Yeomans instructed Hirdes to remove the letters from the employee bulletin board. Yeomans testified that while there were no face-to-face confrontations between Twa and Keeler, she concluded that the content of the letters was "starting to get nasty." Yeomans denied that the letters were removed because they contained "union arguments," and asserted that they were removed because "we don't want verbal assaults on people going up on our bulletin boards." There is no evidence that the exchange of posted letters led to arguments or fights about the union issue.

When the letters were removed, a memo signed by Yeomans was posted on the bulletin boards at both plants. The memo contained the following: "Effective immediately (2/2/07), Ridgeview will not allow the bulletin boards to be used as a format for union/nonunion arguments. Any material that is adversarial in nature from either viewpoint will be removed. Please contact any member of the HR team for approval to place items on the bulletin boards. It's time to get our focus back to making quality parts and meeting the needs of our customers." The entire memo, except for Yeomans name and title, was printed in capital letters, and the final sentence was also bolded. The Respondent has never rescinded the memo or the policy stated therein.

The bulletin boards at both plants serve the same general purposes, and employees at both plants had previously been allowed to freely post their cards or information, without prior management approval and without content restriction. While the union-related back and forth letters were only posted at the Three Mile plant, the memo restricting bulletin board use was posted at both plants. Neither Twa nor Keeler was disciplined in regard to the letters they posted.

### Ben Balczak

Ben Balczak is employed by the Respondent as a hi-lo operator at the Three Mile plant.[19] Press operators fill gondolas (containers) with parts they have produced, and hi-lo operators, such as Balczak, roam the plant picking up full gondolas and replacing them with empty gondolas, and also bringing various supplies to the press operators. In performing these duties, the hi-lo operator job is a somewhat mobile position within the plant. Prior to early 2008, when Balczak was assigned to the east end of the plant, Balczak's job entailed servicing 10 presses from one side of the plant to the other.

[19] Balczak is classified as a "material handler," but operates a hi-lo truck.

### Balczak, January 26, 2007 Level II Written Reprimand/Warning

On January 26, 2007, 2 days after the first Nykamp letter to employees, Balczak was driving his hi-lo in the south room area of Three Mile, near the workstation of leadperson Andrea Olescewski. Balczak asked Olescewski to walk up to his hi-lo, intending to tell her a joke involving an assertedly humorous reference to an antiunion argument made by Nykamp. Olescewski refused, telling Balczak that she was busy. After Olescewski refused Balczak's second request, he dismounted from his hi-lo and walked to her workstation. Balczak asked her what she was "looking for on these parts." Balczak then said to her, "If you ever get to Greenville, you're welcome to use my library card." Balczak testified that this was meant as a joking reference to Nykamp's missive in which he mentioned the possibility of losing benefits if the union effort was successful, including use of the Respondent's library.

Olescewski answered that she didn't like what the Union stood for and that she'd never been in favor of a union. Balczak responded that what bothered him about being an employee in the State of Michigan was that "you are an at-will employee and you signed an at-will contract and they need no reason to fire you." That was the end of the discussion. The entire conversation took about 2 minutes, with Olescewski working the entire time. Balczak testified that he had no product on his hi-lo that he was delivering to Olescewski, nor had he delivered product that would have taken him by her workstation, but that he was driving by her area because he "wanted to pass a little humor onto her." When asked on cross-examination why he cared whether Olescewski heard the joke, Balczak testified, "I told a lot of people at the plant the same thing I had told her, and a lot of people laughed."

Later that same morning, Balczak received a disciplinary warning from his immediate supervisor, John Deering. Balczak reported to the automatic production supervisor's office, where he met with Deering and Olescewski's supervisor, Sherry Gray. Deering handed Balczak a two-page level II written disciplinary action.[20] The first page of the warning described Balczak's actions earlier that morning vis-à-vis Olescewski, and contained the following: "Ben [sic] actions are clear violations of appropriate employee conduct outlined in the RVI Employee Handbook (please see attached copy)," and "Should future incidents of this nature occur, they would result in further disciplinary action." The second page of the warning consisted of page 31 of the Respondent's employee handbook, the section outlining the Respondent's employee conduct and disciplinary policy, with three asserted violations of the Respondent's policy highlighted.

Deering read the first page of the warning to Balczak, and read the highlighted portions of the second page. The highlighted portions read to Balczak are as follows: "malicious gossip and/or spreading rumors; engaging in behavior designed to create discord or lack of harmony;" "deliberate idling, loiter-

[20] The reprimand refers to a written warning received by Balczak "for similar behavior" in August 2005. That is, apparently, the reason the discipline was written at the second step. The prior discipline occurred prior to the union activity involved herein.

ing, inattention to duty, or leaving workstation without permission;" and "interfering with others in the performance of their jobs or causing a slow-down of production." Balczak signed the warning, and admitted the incident with Olescewski as described in the warning, but called the discipline "not right." While Deering signed the disciplinary warning and handled the disciplinary meeting with Balczak, he did not witness the incident that led to the discipline. Human Resources Generalist Hirdes made the decision to discipline Balczak.[21] Deering testified, in general as to idling offenses, that "if they're idling and they're there for a minute, I'm probably not going to write them up." "But if they're there for five and ten, then yeah, I'm going to do something."

Balczak, February 2, 2007 Level III 3-day Suspension

On February 2, 2007, at about 7 a.m., Balczak and hi-lo driver Huy Pham were near each other on their hi-los. Balczak asked Pham to meet with him by the scrap hopper machines. The two of them met there by themselves, and Balczak handed Pham some union materials he had printed from the internet. Pham started to read the materials, and told Balczak that she didn't want "nothing to do with this." Pham handed the materials back to Balczak. Balczak told Pham that if she didn't want to read the materials while she was on her hi-lo, she should take it to the bathroom and read it there so she wouldn't get caught, but that Balczak needed the materials back that day. Pham responded, "I don't want nothing to do with this." Pham then left, with the entire conversation taking about 2 minutes.[22]

Later that day, Deering, under instructions from Plant Manager MacLaren, brought Balczak to MacLaren's office. Deering left, leaving Balczak with MacLaren and Yeomans. MacLaren imposed a level III 3-day suspension on Balczak, and read the first page of the two-page written disciplinary notice to him. Included in what MacLaren read was the "management comments" section as follows: "On 2/2/07, at approximately 7:30 a.m., Ben approached Huy Pham and asked her to meet him at the West End scrap hoppers. Ben handed a document to Huy and asked her to read it. Huy reported the first line said "do not believe anything Dave Dykamp [sic] said in the quarterly meetings."

The second page of the disciplinary notice consisted of page 31 of the Respondent's employee handbook, the section entitled "Employee Conduct in the Workplace." Highlighted were the following sections: "Deliberate idling, loitering, inattention to duty, or leaving workstation without permission"; "Interfering with others in the performance of their jobs or causing a slow-down of production"; and "Unauthorized soliciting of funds or distributing literature on company property." MacLaren told Balczak that the reason the discipline consisted of a level III suspension was based on the employee handbook, and that his violations were highlighted (circled).[23] Balczak signed the disciplinary notice, upon MacLaren's request. Balczak asked if he could retrieve his belongings from his hi-lo. MacLaren responded that he could, but MacLaren would go with him.

Upon reaching the Balczak's hi-lo on the plant floor, Balczak asked MacLaren if he could use the hi-lo radio to call fellow hi-lo driver Brian Bowman, whom he carpooled with, to let him know that he was leaving and Bowman would have to find another ride. With MacLaren listening, Balczak told Bowman, on the radio, that he had been suspended for 3 days and Bowman would have to find his own ride home. Bowman responded that Balczak had to be kidding. Upon Bowman's comment, MacLaren told Balczak to end the conversation. MacLaren then accompanied Balczak out of the plant, after stopping at Balczak's locker.

When Balczak returned to work on February 8 from the 3-day suspension, MacLaren and Deering met him by the timeclock, and took him to the production supervisor's office. MacLaren talked about Balczak having a strong work ethic and it being unusual that he had two disciplinary warnings in a short period of time, and mentioned that he didn't want "you guys" to say anything to Pham going forward.[24] Balczak told MacLaren and Deering that "[i]f you want to keep an eye on me, let me hang coils,"[25] and also suggested that he had not performed his "janitor of the day" duties the prior week, and he could do that.[26] Deering assigned Balczak temporarily to jani-

[21] Deering's uncontroverted testimony.

[22] From the credited and uncontroverted testimony of Balczak. Huy Pham did not testify.

[23] Testimony varied as to whether some of the disciplinary documents were highlighted or circled, or both. The copy of page two of Balczak's 3-day suspension, introduced as an exhibit, had the relevant sections both highlighted and circled. MacLaren's testimony as to whether the second page of the disciplinary document was highlighted or circled when he handed it to Balczak is inconsistent and not credible. When first asked about the highlighting, MacLaren testified that he didn't recall highlighting the document, didn't remember doing it himself, and didn't recall if the asserted violations were circled when he showed the document to Balczak. But MacLaren also testified that when he pointed out the second page to Balczak, he told Balczak, "the reason this is a level three, 3-day suspension, is based on our handbook employee conduct in the workplace which was attached, and that was *circled* and pointed out what he had done." (Emphasis supplied.) Thus, MacLaren testified that he didn't remember whether page two contained circling when he showed the document to Balczak, and on the other hand he testified that he told Balczak that his violations of rules were circled. Balczak testified that the copy of the disciplinary document introduced as evidence, and containing the circling, is an accurate copy of what MacLaren gave to him. Based on their testimonial demeanor, MacLaren's noted inconsistency of testimony, and the improbability that Balczak would have circled the violations on his own, I credited Balczak that the document contained the circling or highlighting when MacLaren presented it to him.

[24] Balczak testified as to the strong work ethic comment, and MacLaren testified as to the Pham comment. Balczak neither testified to nor specifically denied the Pham comment, and MacLaren neither testified to nor specifically denied the work ethic comment. Based on the context of the conversation, I credit both, and find that MacLaren made both comments.

[25] A material handler who hangs coils, operates a crane, and hangs raw material on the mandrels for the automatic presses.

[26] This is Balczak's credited testimony. In their testimony, MacLaren and Deering remembered it differently. MacLaren testified that Balczak requested to be placed on a press. Deering testified that Balczak asked to be taken off the hi-lo, but did not indicate where he wanted to work. In general, based on his demonstrated memory, testimonial demeanor, and his willingness to answer questions of all counsel, Balczak is a credible witness, and I so find. To certain questions,

torial duties, while he and MacLaren discussed what job to assign Balczak to.

After lunchbreak on February 8, Deering told Balczak that the Respondent was going to start training Balczak on a press. Balczak had never worked on a press before. He was then trained for 1-1/2 days and assigned to the 150 Minster press.[27]

Most of the Respondent's production employees are organized into three employee cells. Each cell operates two presses. Generally, two of the cell members operate presses and the third serves as a material handler. The cell members have the ability to decide among themselves which members will perform which functions. The press operator is basically a stationary job, while the material handlers, including hi-lo operation, are mobile throughout the plant. The sense of the testimony is that wire hanging is part of the material handler function.

Balczak, March 22, 2007 Level I Reprimand

Balczak received a Level I oral reprimand/warning from Deering on March 22, 2007. The warning was memorialized in a written disciplinary action form signed by Deering and Hirdes. The management comment section on the form was completed as follows: "On 2/19/07 you ran part numbers 56154/5 in the 150M Northridge started to use these parts on 3/20/07 and found that they were mixed. They have sorted one half of a gon[28] of 17,000 pcs and found several 56154 in the container of 56155. In the future while running right and left hand parts you need to pay close attention to insure that parts do not get mixed." In plainer language, the discipline was for, assertedly, mixing left and right side automotive parts.

The process utilized at Three Mile for moving and auditing parts after production is as follows: The press operator produces parts which are placed into a gondola container. When a gondola is filled, it is picked up by a hi-lo operator, who replaces the filled gondola with an empty one. Both the hi-lo operator and the press operator complete an audit label[29] containing information as to the item manufactured, press operator, hi-lo operator, and other information. The hi-lo operator scans the label barcode into inventory, adding information identifying the hi-lo operator. The parts then move into a particular storage aisle, depending on where they are headed to next. Some of the parts are sent to Northridge for additional or secondary manufacturing. Some of the parts are placed into storage to await shipping to a customer.

The label, introduced at the hearing, an audit label from the gondola upon which Balczak received the disciplinary warning, did not contain Balczak's, or any other, operator number.[30] The label is dated March 19 and, thus, conforms to the audit of the assertedly mixed parts rather than to the original production of the parts. As to the asserted mixed parts, Deering received a phone call from an unidentified employee[31] in the quality control department at Northridge, informing Deering that they were attempting welding operations on a certain batch of parts from Three Mile, but because the parts were mixed it was affecting their operations. Deering told the Northridge quality control employee to return the parts to Three Mile for sorting.[32] When the parts returned to Three Mile, Deering told Balczak to re-sort the parts, and gave Balczak the reprimand. Upon re-sorting, Balczak found no mixed parts, and so informed Deering.

Balczak, March 23, 2007 Level II Written Reprimand/Warning

The following day, March 23, Balczak received another disciplinary action from the Respondent, this one a level II written reprimand/warning for assertedly mislabeling a gondola of parts. Deering, in his office, with Hirdes present, handed the warning to Balczak, and told him that parts were incorrectly labeled. The disciplinary action memo states that on March 22, Balczak mislabeled right side parts as left side and that there were also mixed parts.

Balczak testified while he signed the disciplinary warning, he did not agree that he had, in fact, either mislabeled or mixed the parts. Deering testified that he didn't know whether he had the label which contained the asserted mislabeling with him at the time he imposed discipline on Balczak, and that the label introduced at the hearing, as being on the gondola filled by Balczak on March 22, did not include the identification of the press operator, apparently because it was re-labeled at Northridge. When asked on cross-examination whether Deering showed him the mislabeling, Balczak answered, "—I believe so." (The dashes are contained in the transcript of the testimony.) With Deering not remembering whether he had the label with him when disciplining Balczak and with the lack of certainty implicit in Balczak's answer on cross-examination, I decline to make a finding as to whether Deering actually showed Balczak the asserted mislabeling.

The record contains no evidence that Balczak actually committed the asserted mislabeling or mixing of parts on March 22, for which the March 23 discipline was imposed, other than the hearsay testimony contained in the written disciplinary action memo given to Balczak by Deering. The "management comments" on the disciplinary memo are as follows:

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Balczak displayed a hesitancy in answering. However, in my close observation of his testimonial demeanor, it appeared that such was caused by the nervousness of being on a witness stand, rather than by any intention to deceive. Here, Balczak's recollection is explicit and his answers on direct and cross-examination consistent. Contrariwise, Deering's testimony does not support MacLaren's recollection that Balczak asked to be placed on a press.

[27] The 150 Minster press, is a 150-ton automatic press, the smallest of the Respondent's automatic presses. The manual presses require the operator to physically grab a part, put it into the press to reform it. With automatic presses, the material is automatically fed through the press, which stamps out the parts.

[28] The record includes references to this container as a "gon" or "gondola." It is used by the Respondent as a container for manufactured parts. I utilized "gondola" throughout to refer to this container.

[29] The press operator and the hi-lo operator both perform a "label to part" audit to ensure that the label correctly describes the parts in the gondola.

[30] The label introduced at the hearing had been removed from the gondola by Balczak.

[31] Deering testified that he did not remember the quality control employee who called him.

[32] Testimony varied as to whether it was normal practice to return mixed parts to Three Mile rather than performing the re-sort at Northridge. The sum of the testimony is that the practice was not typical, but neither was it unusual, depending on circumstances.

> On 3/22/07 Northridge found one skid of 78254 labeled as 78255, and one skid of 78255 labeled as 78254. On 3/20/07 you ran these parts out of the 150M where you applied the labels. It is standard practice that all operators perform a part to label audit before applying labels to containers, assuring our customers received correctly labeled parts. Ben, you need to perform a part to label audit every time before placing labels on containers to help RVI meet our customer's expectation of 100% proper labels. In addition to being mislabeled, employees at Northridge found several 78254 mixed in with the 78255. You need to pay close attention while running these parts to eliminate this problem. This mislabel incident in conjunction with the quality issue on 2/19/07 concerning mixed parts, is the reason for the written reprimand. Any further issues of this nature will result in further disciplinary action.

While both Deering and Balczak testified that they signed the disciplinary memo, there is no specific evidence as to who wrote the management comment section.

The Respondent's labeling procedure is as follows: a supervisor makes a set of left-side and right-side labels; the supervisor places the labels next to the container where the parts are running; the press operator performs a part to label check and then calls for a hi-lo operator; the hi-lo driver then performs a part to label check, scans the parts, and takes them away.

Gentz, February 21, 2007 Level I Oral Reprimand/Warning

Glenn Gentz was employed by the Respondent as a material handler at Three Mile from 1993 until his discharge on March 27, 2007. Although Gentz was classified as a material handler, he performed the function of hi-lo truckdriver and, within the Respondent's cell concept of employee organization, he also "hung coils," helped set up dies, and assisted press operators with operational problems. Gentz spent about 90 percent of his worktime performing material handling (hi-lo operation) and hanging coils.

Gentz testified that he learned of the union organizational attempt from Balczak and spoke to other employees about the Union "probably a couple of times a day.[33] Gentz' name appeared on the late January/early February 2007 posted list of asserted employee union supporters. MacLaren and Gentz spoke right after the list was posted. Gentz testified that MacLaren apologized about the posting, and Gentz responded that people "have been hurt due to this kind of you know stuff going on in shops." MacLaren testified that Gentz told him that he knew his name was on the list, but he was "kind of on the fence about this." Neither witness denied the other's testimony. Based on witness demeanor and context, I find that the testimony of both is credible as to those parts of the conversation they remembered and testified to. Thus, I find that the comments testified to by both were made during the conversation.

About February 19, 2007, Gentz stopped his hi-lo to help troubleshoot a slippage problem that a press operator was having.[34] The operator told Gentz he was having a problem with the press feeder system. Gentz walked to the back of the press to observe and "grabbed my bag of potato chips to go along with me." Supervisor Deering noticed Gentz standing by the press eating the chips. Deering approached Gentz and told him that the 404 press, which had been down, was now running and Gentz should be over there checking parts. Gentz replied that he didn't hear anybody call for him, and that the press had been down for 1-1/2 days.[35] Gentz had been at the press for about 15 minutes when approached by Deering.

A day or 2 later, Deering called Gentz into the supervisor's office and handed Gentz a disciplinary action memo dated February 21, containing a level I oral reprimand/warning. The disciplinary warning, written in the first person, is signed by Deering. The comment section asserts that Deering "had numerous complaints of you not performing all duties of your job," and that "[o]n Monday 2/19/07 I witnessed you eating/idling behind the 301M while the 404M was down, at which time I verbally asked you to get involved."

Deering read the discipline notice to Gentz in its entirety. Gentz told Deering that he was monitoring the feed on the press. Deering responded that "may be possible . . . but there are still other incidents that we want to correct, and that's why we're going forth with this document." Gentz refused to sign the warning, telling Deering that he didn't believe it (that other employees had complained about him). Gentz left the office and as he was walking away said in a loud voice towards Deering and MacLaren "and you wonder why people want a union." Deering and MacLaren were about 25 feet away from Gentz when he made the comment.[36] Deering did not respond.

As to the asserted numerous complaints, Deering testified he had received complaints from the operator of the 1000-ton press and the operator of the 1001-ton press. When asked on direct examination for the names of those operators, Deering testified, "Probably maybe a Jim Erhorn, Jose Casera." Such hedging in answer to the question of the Respondent's counsel, together with the absence of any other evidence in support of such complaints, lends doubt to whether there were, in fact, any such complaints.

[33] Gentz testified that he learned of the union attempt from Balczak, about 6 months before he was discharged on March 27, 2007. Gentz did not specify in his testimony when his asserted conversations about the Union with other employees took place.

[34] Part of his duties in the cell concept.

[35] While Deering testified that he did not say anything to Gentz at the time, the disciplinary action memo states that, in fact, Deering at the time of the incident, asked Gentz "to get involved." Gentz, who I find to be a reliable witness based on his testimonial demeanor and quality of recollection, gave sufficient detail as to the conversation with Deering to make it likely that it occurred, and I so conclude.

[36] Gentz, Balczak, and employee Michael Segers all testified similarly, but not identically, as to Gentz' comment. Segers' is the most detailed testimony both as to the comment and as to the location of Gentz and Deering when the comment was made. As Segers was an impressive witness, based on his testimonial demeanor, strength of recollections, and the noncombative manner of his testimony, I chose to credit his version. However, Deering denied hearing the asserted comment made by Gentz. As Segers' credited testimony indicates that Deering was about 25 feet away from Gentz when he made the comment in a somewhat noisy plant, I cannot conclude that Deering, in fact, heard Gentz.

Gentz, March 27, 2007 Discharge

Jose Calderon, employed by the Respondent at Three Mile, operates a 400 Minster press. For a time on Tuesday, March 23, 2007, he assisted press operator Juhar Birhanu at Birhanu's 300 Minster press. Gentz was operating his hi-lo in the area of the 300 Minster, driving down the aisle. As Calderon completed assisting Birhanu he backed into the aisle,[37] to return to his press. Birhanu grabbed Calderon's shoulder and told Calderon to "be careful." As Calderon looked up, he saw Gentz on his hi-lo, about a foot or 2 away.[38] Gentz had not sounded the hi-lo horn, and Calderon could not hear the approach of the hi-lo because of the plant noise level.

Gentz stopped the hi-lo and dropped its forks on the floor, making a loud noise. Calderon didn't hear the forks drop, but was startled by the presence of the hi-lo. Calderon, upset because he believed Gentz was not operating the hi-lo in a safe manner, walked closer to Gentz and asked in a raised voice, "Glenn, please next time can you play the horn?" Gentz responded in a raised voice that it was not a "corner"[39] and Calderon should watch where he was walking. Calderon then walked past Gentz, still on his hi-lo, on his way to the restroom. Calderon credibly testified that as he was walking to the restroom he was still upset with Gentz and with Gentz' verbal response. Calderon turned, walked back to Gentz, stopped 1 to 2 feet away, and said to Gentz, "I'm going to ask you one more time, can you please play the horn next time. I don't have eyes in the back of my head."

As Calderon spoke, Gentz, still on the hi-lo, grabbed the collar of Calderon's shirt with two fingers[40] and pulled Gentz a little closer, about 6 inches away. Then Gentz repeated that it was not a corner, and let go of Calderon. Calderon testified that Gentz' voice was "low, but very strong." Calderon then walked away. During the entire incident, Gentz remained on the hi-lo, and did not poke or push Calderon, or make threats to him.[41]

Neither Calderon nor Gentz reported the incident to management, but Calderon did mention it to fellow employee Alberto Davila, who told MacLaren during lunchbreak that there was an incident with Calderon and Gentz, and that Calderon almost got hit by a hi-lo. MacLaren immediately asked HR Representative Hirdes to investigate the incident.

At about this time, Calderon's supervisor, Sherri Gray, asked Calderon about the incident. Calderon told Gray his version of what happened. According to Calderon, Gray then went inside her office to speak to somebody else. Gray then told Calderon to go back to work.

Hirdes testified that after MacLaren told him to investigate the incident, he called Calderon into his office, and just the two of them met. Calderon testified that MacLaren was also present and that the meeting took place in MacLaren's office.[42] Hirdes describes his investigatory interview as being just between himself and Calderon. MacLaren testified that he was not present during the interview. Calderon testified that not only was MacLaren present, but he began the interview by telling Calderon that something happened this morning, and asking what had happened. Calderon repeated his version of what happened. After Calderon was excused to go back to work, Hirdes typed a statement based on Calderon's version, for him to sign, which Calderon did the following day.

About 15 minutes later, Hirdes spoke with Juhar Birhanu, the press operator whom Calderon had been helping just before the incident with Gentz. Hirdes asked what happened, took notes, typed out a statement based on the notes, asked Birhanu to read and sign the statement, and Birhanu signed the statement. In sum, the statement that Birhanu signed for Hirdes states as follows in respect to the incident: that Calderon backed up and Birhanu yelled "hi-lo"; that Calderon told Gentz to "Honk your horn by the press"; that Gentz replied to Calderon, "[Y]ou watch where you are going"; that "a little later" Birhanu saw Calderon walk up to Gentz (who was on the hi-lo); that Gentz "grabbed Jose by the shirt and say something about not honking the horn by the press and you better watch it."

After interviewing Calderon and Birhanu, and before speaking to Gentz, Hirdes told MacLaren that the situation was "pretty serious,"[43] and that Calderon claimed he was almost hit by a hi-lo driven by Gentz, that Calderon felt threatened and that there was a witness who saw the whole thing. At MacLaren's instructions, Calderon, and then Birhanu, individually, were brought to MacLaren's office to repeat their stories to MacLaren and Hirdes.

After the Respondent's supervisors had solicited Calderon's version of the incident three times and Birhanu's twice, MacLaren and Hirdes decided to interview Gentz. Either later in the afternoon after the interviews with Calderon and Birhanu, or the next morning, Gentz was called into a supervisor's office and met with MacLaren and Hirdes.[44] Hirdes and MacLaren questioned Gentz, and Hirdes took notes. Gentz was

[37] Hirdes testified that Calderon told him he was "backing up," when Calderon described the incident to Hirdes during the Respondent's investigation.

[38] Calderon and Gentz both testified as to this incident. While their testimony differs in some aspects, it is similar in most. Where the testimony differs, I credit Calderon, who impressed me with his testimonial demeanor, and willingness to answer the questions of all counsel in a noncombative manner. Further, unlike Gentz, he has no direct stake in the outcome of the litigation.

[39] Right angle "corner" where aisles meet.

[40] Gentz testified that he grabbed Calderon's shirt sleeve. Calderon testified it was his shirt collar. I chose to credit Calderon for the reasons set forth above, but note that the interchange was quick and it's not unusual that two people testifying about the same incident remember it slightly differently.

[41] Calderon's testimony. Calderon testified that while Gentz issued no threats to him, he believed Gentz threatened him by the tone of his voice.

[42] From the testimony of MacLaren and Hirdes, it appears that the first time he was called by management about the Gentz incident, he met only Hirdes, and the second time he met with Hirdes and MacLaren.

[43] MacLaren's testimony.

[44] Hirdes and MacLaren testified that MacLaren was present. Gentz testified that the meeting was with only Hirdes, but also said, "[I]t might have been just Brian." While I generally credit Gentz, here, in view of Gentz' expressed uncertainty, the testimony of Hirdes and MacLaren is more reliable.

asked if he knew what the meeting was about, and responded by asking, "[A] hi-lo incident?" Hirdes told Gentz that he'd be writing down what Gentz said and in fact, later, after the meeting produced a written statement, based on the interview, which Gentz signed.

Hirdes asked Gentz what happened by the 300 Minster press. Gentz said[45] that he was slowly driving his hi-lo down the aisle by the 300 Minster press, that Calderon stepped out in front of the hi-lo, that Gentz had stopped his hi-lo and let the forks drop on the ground and make a clanking noise so that Calderon would know he was there, that Calderon turned to Gentz and yelled, "[Y]ou honk your horn," that Gentz yelled back, "[Y]ou look where you're going," that the hi-lo was about 2 to 3 feet from Calderon, that Gentz did not speak to Calderon after the incident, and that Birhanu witnessed the incident.[46]

While Hirdes testified that he asked Gentz whether he remembered anything else and that Gentz answered that he did not, and MacLaren testified that he asked Gentz twice to tell him everything that happened with Calderon and Gentz told him that nothing else happened, the statement that Hirdes prepared for Gentz based on Hirdes notes of the interview, and detailed in other respects, does not contain such a declarative response by Gentz. In other words, it would have been easy and natural for Hirdes to put a sentence in the statement he prepared for Gentz to the effect that the statement contains everything that Gentz knew about the incident, but he did not. Based on such, I decline to find that Hirdes or MacLaren asked whether Gentz remembered anything else or that Gentz answered that he did not.[47] In any case, Gentz was not asked, and did not volunteer, whether he touched Calderon during the incident. However, MacLaren did specifically ask Gentz if any words were exchanged between himself and Calderon.[48]

After interviewing Gentz, MacLaren and Hirdes discussed the findings of the investigation. MacLaren testified, "I sit down behind closed doors with Brian Hirdes, and based on what Jose [Calderon] had told me, the witness of Juhar (Birhanu), I am enforcing the policies that Ridgeview has, and because an employee of mine was physically either intimidated or threatened, I called [Human Resources Manager] Terri Yeomans and made a recommendation that Mr. Gentz be terminated." MacLaren also testified that before making the recommendation he did not review Gentz' personnel file, was not aware of any other discipline against Gentz for violence or threats, did not consider any lesser form of discipline, and that other than the incident with Calderon, Gentz was a satisfactory employee.

Hirdes also participated in the call to Yeomans and also recommended that Gentz be discharged. Hirdes testified, "I told Terri [Yeomans] that we had an eyewitness account of Glenn grabbing Jose Calderon by the shirt. I said that Juhar saw him grab him. And I said that Glenn [Gentz] did not admit to grabbing him." Hirdes testified that he further told Yeomans that "given that there was physical contact and threatening behavior on the floor in front of other employees, I recommend that we terminate him based on that, what I found out in the facts." Yeomans responded to the recommendations of MacLaren and Hirdes by telling them that because Gentz is a "very long term employee at Ridgeview" she didn't want to go forward with anything until she could discuss the situation with the Respondent's owner, Nykamp, and he either "blessed it or didn't."[49] Nykamp was out of the office, and not scheduled to return until the following Monday or Tuesday. HR Manager Yeomans testified that she did not remember Gentz having any prior disciplinary issues for arguing with or threatening other employees, or any other disciplinary issues for personal involvement with another employee.

On Tuesday, March 27, after Yeomans consulted with Nykamp, Gentz was called into a meeting with Yeomans and MacLaren. MacLaren told Gentz that "based on the thorough investigation with the incident between you and Jose Calderon and we have a witness, physical intimidation or threatening is not allowed in this plant, therefore we need to part ways." Gentz asked what "part ways" meant. MacLaren responded that it meant that the Respondent was terminating his employment effective that day. Gentz asked if Nykamp knew about the discharge, and then said that his wife was sick and son being sent to Iraq. MacLaren responded that they were still discharging him.

MacLaren told Gentz that Calderon claimed that Gentz grabbed his shirt and pulled him forward. Gentz said that he did, in fact, grab Calderon's shirt. MacLaren asked why Gentz hadn't told him that when Gentz spoke earlier with Hirdes and MacLaren. Gentz said he didn't think it was a "big deal." MacLaren responded that it was a "huge deal." Gentz asked if he could show MacLaren what he did, and MacLaren agreed. Gentz then grabbed the collar of MacLaren's T-shirt with two fingers and lightly pulled it. Gentz said that he knew that was wrong, so he took his hands off Calderon immediately. MacLaren did not change the discharge decision, and Hirdes escorted Gentz off the Respondent's property. Yeomans testified that an additional reason for discharging Gentz was because he lied during the investigation, referring to the fact that Gentz did not mention touching Calderon to Hirdes, during the Respondent's investigation of the incident.

Smith, Movement in Plant

David Smith was initially employed by the Respondent in July 1997, left the employment in October 1999, and was again

[45] MacLaren testified that he asked the question, and that Gentz initially answered that "nothing" had happened. Neither Hirdes nor Gentz testified that Gentz so answered. I do not credit MacLaren as to this.

[46] Gentz, Hirdes, and MacLaren all offered slightly different versions of the interview. I, essentially, chose to credit the version contained in the statement signed by Gentz and prepared by Hirdes based on his interview notes. The statement was prepared and signed close in time to the interview, and based on the testimony of both Hirdes and Gentz it appears both credible and largely consistent with the recollections of the participants.

[47] Even if I had found to the contrary, it would not have changed the conclusions herein.

[48] Testimony of MacLaren in response to question of the Respondent's counsel:

> Q. And did you happen to ask him if any words were exchanged between himself and Mr. Calderon?
>
> A. Yes, I did.

[49] MacLaren's testimony.

employed by the Respondent from July 2000 until his voluntary departure on February 19, 2008. Smith worked at Three Mile as a shipping and receiving clerk, operating a hi-lo, until he transferred to the Northridge facility in August 2007, where he was employed as a secondary operator. His organizational activities on behalf of the Union are detailed above. Nykamp testified he was personally aware of Smith's union activities by January 2007.

In mid-January 2007, Smith was driving his hi-lo in the Three Mile plant, and noticed press operator Glen Ockert standing by his press, with the press not operating. Smith asked if the press was broken. Ockert responded that his supervisor told him to take a break because he was operating the job himself. They chatted for less than a minute when supervisor Sherri Gray walked up to them and asked whether Ockert's press should be running. Ockert responded, "No," and Gray walked away. At that, Smith left, telling Ockert that Gray looked "kind of mad," and he better leave.

When Smith reported to work the next day, Smith's supervisor, Fred Thomas, called him into his office and told Smith that he was going to tell everybody at the daily meeting, but he was going to tell Smith first, that "[y]ou need to stay in your own department." Thomas did not further explain his directive. Later that day, at the departmental daily meeting, Thomas told the assembled workers, "I told Dave already and I'm going to tell the rest of you, you need to stay in your own department."[50] The Respondent had no such previous policy restricting employee movement in the plant.[51]

About a week later, Smith was assigned for 2 days to work at Northridge to replace an absent shipping and receiving employee. Returning from the 20-minute daily break,[52] Smith engaged in a brief discussion, lasting seconds, with fellow employee Mary Barr, as they were walking across the plant. As they were walking, Plant Manager VanderLaan waived Barr to come to him. Barr walked over to VanderLaan and Smith returned to work.

About 20 minutes later, Smith was approached by the Respondent's vice president, Doug Dykstra, and the Respondent's shipping department manager, Jim Bagley. Dykstra said to Smith that someone told him that Smith was walking up and down the plant's aisles talking to people. Smith denied that was true, that he went to lunch with everyone else, that he came back from lunch with everyone else, and that he went immediately back to work. Dykstra repeated that someone said Smith was walking up and down the aisles talking to people. Smith again told Dykstra this wasn't true. Dykstra replied that someone's lying, and he would probably be back to see Smith, and then left.

The following morning, Supervisor Thomas[53] called Smith into his office and told him that he had told him at Three Mile that he needed to stay in his own department, and he needed to tell him to stay in his own department here at Northridge also.

Smith, January 4, 2008 Job Jeopardy Agreement and Threat to Discharge

Shortly after Smith's transfer to Northridge in August 2007, he continued talking about the Union with fellow employees, and also initiated a discussion about the Union with the Northridge plant manager, Ron VanderLaan, in VanderLaan's office. Smith told VanderLaan that there were issues with how employees were being treated by the Respondent, that employees had made attempts to resolve the issues to no avail, and he wanted VanderLaan to know that "we will continue our union organizing efforts." Smith pointed out the attendance program as a particular problem area. VanderLaan asked Smith if he would be willing to meet with the Respondent's owner, Nykamp, to discuss shipping department issues. Smith agreed, with the caveat that he could bring with him a Three Mile shipping department employee who is familiar with shipping issues.

Within a week, in late August or early September 2007, the meeting took place with Smith, Nykamp, VanderLaan, and Three Mile shipping department employee Jeff Westfall. Smith and Westfall complained about Shipping Department Supervisor Fred Thomas. Smith also complained about the attendance point system, shift hours, that disciplinary writeups received by employees Glen Ockert and Tammy Weerstra were unfair, and that employees who came to talk to Nykamp were fired. Nykamp said he would look into the writeups, that he wasn't aware of them, and that it wasn't true that he fired people who came to see him.[54] The meeting lasted about 45 minutes. Nykamp testified that at the time of the meeting he was aware that Smith was preparing a letter or newsletter about union issues that stated that if employees came to talk to Nykamp they would be fired. Nykamp testified that he was aware of the letter because Smith had given a copy of it to VanderLaan and Smith's name was on it.[55]

About a week later, Nykamp stopped by Smith's machine and said he wanted to follow up their meeting, that he wanted Smith to know that he didn't find either of the writeups in personnel files, but he was on his way to Three Mile to talk to "them." Smith said he didn't understand why Ockert and Weerstra would lie about receiving the writeups, "but if they're not there, they're not there." Nykamp said the was going to talk to "them" that day. The next day, Balczak told Smith that he had seen Nykamp on the Three Mile shop floor, but that he

[50] Smith's testimony. Thomas did not testify.

[51] Testimony of Smith and Gentz.

[52] Respondent's employees received one break a day, 20 minutes, that was utilized as a lunchbreak.

[53] Thomas supervises the shipping departments of both plants, on all shifts.

[54] Smith, Nykamp, and VanderLaan all testified about this meeting. Smith's testimonial demeanor, including his responsiveness to questions of all counsel, was impressive. There is no allegation involving his quitting the Respondent's employ, so his possible financial benefit as a result of the litigation is minimal. Much of the testimony as to this meeting is not in direct conflict and my findings relied on the testimony of all three. However, because of the greater level of detail in some of Smith's testimony and his testimonial demeanor, I credited such in areas of conflict or where detail was lacking in other testimony.

[55] Nykamp testified about Smith's letter. He testified that he didn't know whether he would call it a union newsletter, but it was about union issues.

was told by Weerstra and Ockert that Nykamp hadn't spoken to them.

In late December 2007, Smith approached VanderLaan on the shop floor and told him that he owed him an apology, that he had been avoiding VanderLaan, but his frustrations were with Nykamp, not VanderLaan. VanderLaan asked why Smith was frustrated. Smith replied that it was because Nykamp was a two-faced liar. VanderLaan asked why Smith thought that. Smith responded that Nykamp was supposed to investigate the disciplinary actions involving Weerstra and Ockert and he never did, and that he didn't believe anything Nykamp says. VanderLaan asked what made Smith think that Nykamp hadn't spoken to them. Smith replied that he had looked into the situations personally and Nykamp never talked to them.[56]

VanderLaan reported the conversation to Nykamp, and Nykamp and VanderLaan decided to have a meeting with Smith.[57] Nykamp testified that he decided to have a meeting with Smith to "understand why he was saying I was lying to him and why he's telling people that." On Thursday, January 3, 2008, VanderLaan asked Smith into his office, where the two of them engaged in small talk for a few minutes. A few minutes later, Nykamp also entered the office.

Nykamp said, "I heard you called me a liar. Is that what you're telling people?" Smith responded, "No, not yet. But you did lie to me. You told me you were going to talk to these people, you were there, you never talked to them, you lied to me." Nykamp replied that the writeups were not in their files. Smith testified that he told Smith that he had just read Ockert's writeup, even though in reality he had never seen such a writeup. Nykamp then leaned across the round table they were all seated at and said to Smith in a raised voice, "Then show it to me." Nykamp told Smith that if he wasn't happy there, why didn't he leave.[58] At some point during the meeting, Smith talked about why the employees needed a union, and accused Nykamp of treating union supporters differently from other employees.[59]

At the end of the meeting, Smith said that the conversation was "going nowhere," and he headed towards the door to leave. As Smith was leaving, Nykamp said to Smith, "[I]t sounds like you're not happy here, and you need to make a decision. Either stay here and be unhappy, or go someplace and be happy."[60] Smith responded, "I am quitting; I'm working on my exit strategy right now." Smith then left the office.[61]

During the meeting, Smith's voice was louder than Nykamp's testimonial voice, but Smith was not "screaming," nor did he make threats, use profanity, or say anything about hurting anybody or hurting himself.[62] Nykamp also testified that his own voice was "louder" during the meeting. VanderLaan testified that at times during the meeting Smith appeared nervous, his hands were shaking, his face red, and pupils dilated. When asked about Smith's gestures during the meeting, VanderLaan testified that he thought they showed frustration, and were not threatening.

Following the meeting, Smith returned to work for about 5 minutes, and then, upset over the meeting, decided to leave work for the rest of the day. He received permission from his supervisor, and left. Smith returned to work on Monday, January 7.

Also after the meeting, VanderLaan and Nykamp met with Yeomans and discussed their perceptions of the meeting. VanderLaan told Yeomans about his observations of Smith's nervousness and agitation, and that his biggest concern was Smith's comment about an "exit strategy," that he was concerned about what this meant. Nykamp told Yeomans that he was also concerned about the "exit strategy" comment, and wondered what was meant by "exit strategy" and whether it could be a reference to workplace violence.[63] Yeomans suggested they put Smith on a job jeopardy agreement (JJA) that would require him to attend counseling so there could be an assessment as to whether there was a threat. Nykamp and VanderLaan agreed.

Prior to recommending the JJA and after learning of the "exit strategy" comment, Yeomans did not review Smith's personnel file or attempt to further investigate the incident by, for example, taking a statement from Smith. Yeomans testified that no employee had reported to her that they were frightened by Smith, and Smith's supervisor had not reported any threats by

[56] Findings based on VanderLaan's testimony. VanderLaan and Smith are both generally credible witnesses based on their testimonial demeanor, strength of recollections, and willingness to answer questions of all counsel. Here, their versions of the conversation are not in great conflict, but VanderLaan's testimony is much more detailed and reflective of a better memory of the conversation.

[57] VanderLaan testified that the idea for a meeting with Smith was his, and that he invited Nykamp to attend.

[58] On cross-examination, Nykamp denied that he asked Smith why he didn't quit. He testified that he told Smith that if he wasn't happy, maybe he should be doing something else. Regardless, the words have the same or similar meaning. Either it was a rhetorical or sarcastic question, or a suggestion.

[59] VanderLaan initially testified that Smith accused Nykamp of treating union supporters differently. Later, VanderLaan clarified his testimony to indicate that while Smith didn't use the terms "union supporters" or "organizing," he did talk about what the union organizers were trying to accomplish and then stated that "they" weren't being treated fairly by the Respondent. From VanderLaan's testimony, it's clear that Smith was referring to union supporters, and was so understood. VanderLaan testified, "He was definitely—I think he was referring to the union."

[60] VanderLaan's testimony.

[61] Smith, Nykamp, and VanderLaan all testified as to this discussion. The three versions agreed to much of what occurred, but none of the versions included everything testified to by the other two witnesses. VanderLaan testified that Smith talked about things which VanderLaan couldn't remember at the time of his testimony. My findings are based on the testimony of all three. Certain findings are based on the testimony of Smith, not directly contradicted by Nykamp or VanderLaan, and/or my conclusion that, based on my assessment of testimonial demeanor and logical context, Smith is a generally credible witness.

[62] Nykamp's testimony.

[63] Yeomans testified that VanderLaan said that Smith was "speaking in tongues," and "babbling." VanderLaan's testimony does not support this. VanderLaan testified that Smith was "chattering," but testified that the "chattering" was as to comments Nykamp made at the Respondent's quarterly meeting. Nothing in VanderLaan's testimony supports the idea that Smith was speaking in tongues or "chattering about various random and seemingly disconnected topics," as the Respondent asserts in its counsel's brief.

Smith to others. The Respondent made no effort at the time, or subsequently, to ascertain from Smith what he meant by his exit strategy comment.[64]

When Smith returned to work on January 7, he was called into a meeting in a conference room, with VanderLaan and Yeomans. At his request, Smith was allowed to bring fellow employee Ray Trujillo with him. Yeomans read the JJA to Smith and asked him to sign. Smith signed and added the words "signed under threat of termination." Yeomans told Smith that to avoid discharge he didn't need to sign the document, but simply live up to its terms in respect to seeing a counselor at Morningstar Health, and following any recommendations they make.

The JJA required Smith to attend a counseling session at Morningstar Health, to comply with any recommendations made by Morningstar Health, and to only return to work on January 8, if Morningstar Health agreed that he was ready to return. The JJA also provided for discharge if the Respondent determined that Smith failed to meet and maintain the requirements of the agreement. Finally, the JJA provided that the Respondent would pay for up to five sessions at Morningstar Health, but that Smith would be responsible "for all other costs of treatment, if deemed necessary."

Smith complied with the JJA, attended a session at Morningstar Health on January 7, was cleared to return to work, and returned on January 8. Morningstar referred Smith to Pine Rest Counseling for additional sessions. Smith attended at least two sessions at Pine Rest, which were covered by his health insurance except for a $54 copay the first time and $34 the second. Smith fulfilled the terms of the JJA, and then voluntarily quit his job with the Respondent in February.[65]

## Analysis and Conclusions

### Alleged Impression of Surveillance

Complaint paragraph 7 alleges that the Respondent's newsletter of January 24, 2007, created the impression of surveillance, and violated Section 8(a)(1). I found that the Respondent's January 24, 2007 "Newsbreak" was distributed to employees, and contained a letter from Nykamp which, among other things, stated, "I recently learned that several individuals are encouraging others to consider a Union at RVI."

"The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance." *Flexsteel Industries,* 311 NLRB 257 (1993). Employees should be free to engage in union activities and express their sympathies without fearing that management is "peering over their shoulders." The standard is an objective one, based on the perspective of a reasonable employee. Evidence of actual surveillance is not a necessary ingredient to proving such a violation. *Flexsteel,* supra.

Here, the Respondent admits the facts asserted as a violation, but, citing *Bridgestone Firestone South Carolina,* 350 NLRB 526 (2007), argues in its brief that Nykamp simply informed employees in the newsletter what he had been told by numerous employees, that is that some employees were engaged in union activity and that such is not a violation. In fact, I found that a number of employees had discussed the Union with Nykamp prior to, or about the time, of the newsletter.

*Bridgestone*, however, is inanalogous in a crucial respect, that is, that the employer therein specifically mentioned in its missive that it learned about the union activity from information provided to it by employees and thanked employees for providing the information. Here, Nykamp's letter to employees simply informs them that he has learned "that several individuals are encouraging others to consider a union . . .," and mentions nothing about the source of such information, leaving to employees to speculate as to how the Respondent obtained the information. Indeed, in *Bridgestone,* supra at 527, the Board specifically held that "merely informing employees that their coworkers have volunteered information about ongoing union activities does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information."

Here, as the Respondent informed employees it had learned of the union activities of certain individuals, but did not inform employees of a legitimate source for the information, it left it to their speculation and, thus, employees could reasonably assume their union activities were under surveillance. See *Park N Fly, Inc.,* 349 NLRB 132, 133 (2007). Under these circumstances, I conclude that the circulation of Nykamp's letter with the newsletter violated Section 8(a)(1), as alleged in the complaint.

### Employee Movement in the Plant

Complaint paragraph 8 pleads that on January 16, 2007, at Three Mile, and on January 24, 2007, at Northridge, the Respondent violated Section 8(a)(1) by imposing restrictions on employee movement in the plants, in response to union activities. I found that on three occasions on two dates in January 2007, supervisors instructed specifically Smith, and other shipping department employees, to remain in their department during the workday, and that this policy did not exist prior to those occasions. As found above, by that time the Respondent was aware of the union organizational activity, and Smith was publicly acknowledging his participation by wearing union insignia at work.

Here, the Respondent's institution of a new policy limiting the movement of shipping department employees following the inception of union organizational activities interferes with, coerces, and restrains employees in their exercise of Section 7 rights, as alleged in the complaint. See *FiveCap, Inc.,* 332 NLRB 943 (2000). Although not alleged in the complaint as an 8(a)(3) violation, and not discussed in the General Counsel's brief in the context of such a violation, I have also considered whether, under a *Wright Line* analysis, the Respondent's actions in specifically limiting Smith's movement additionally violated Section 8(a)(3), and conclude that it does.[66]

[64] Yeomans' testimony.

[65] There are no complaint allegations as to Smith's leaving employment with the Respondent.

[66] The factual issue was fully litigated at trial. Under these circumstances, there is no prejudice to the Respondent in also considering whether the same actions also violated Sec. 8(a)(3). The Respondent did not address the complaint allegation as pled, in its brief.

Thus, I found that Smith was active in union organizing, that the Respondent was aware of Smith's union activity and, based on the findings of other violations herein and the public comments of Nykamp to employees, the Respondent displayed and maintained animus towards the Union and the union activities of its employees. The Respondent has presented no evidence that it would have instituted movement restrictions on Smith, notwithstanding the union activities. Accordingly, I find that the Respondent's actions on two dates in January 2007, about January 16 and 24,[67] specifically restricting the movements of Smith at both Three Mile and at Northridge, violated Section 8(a)(3) of the Act. *Flamingo Hilton-Laughlin,* 324 NLRB 72 fn. 2 (1997).

Restricting Employee Bulletin Board Use

Complaint paragraph 10 alleges that about February 2, 2007, the Respondent violated Section 8(a)(1) by promulgating a new rule prohibiting employee usage of employee bulletin boards for posting arguments as to the Union, and removed such postings from the bulletin board.

I found that in late January/early February 2007, a prounion and, then, an antiunion letter were posted on a Three Mile employee bulletin board, and that shortly thereafter, on February 2, the Respondent removed the letters from the bulletin board and replaced them with a memo announcing a new policy as to employee posting on the board. The new policy, set forth in the memo, specifically disallowed posting of "union/nonunion arguments," stated that adversarial material from either viewpoint would be removed, and required the prior approval of management. Previously, the Respondent had allowed employees to post materials of their choice on the employee bulletin boards and did not require permission to do such.

The Respondent, in its brief, citing *Register-Guard,* 351 NLRB 1110 (2007), argues that it did not violate the Act as alleged in that the Respondent's new bulletin board restrictions were narrowly tailored to deal with its perception that the prounion and antiunion posted letters had become disparaging and personal, and that the restrictions applied equally to prounion and antiunion postings. The General Counsel, citing *Fixtures Mfg. Corp.,* 332 NLRB 565 (2000), maintains that inasmuch as the new restrictions allowed postings as to virtually any other subject matter, their prohibition of postings as to union arguments violated the Section 7 rights of employees. On this issue, the General Counsel did not weigh in on the import of *Register-Guard*.

The Board, in *Register-Guard,* supra, a case factually dealing with employee use of an employer's email system for Section 7 purposes and where the employer had instituted a rule that the email system was not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other nonjob-related solicitations, adopted the rationale set forth by the Seventh Circuit in *Fleming Co.,* 349 F.3d 968, 975 (2003), and held that the rule did not violate the Act, unless it was discriminatorily applied. The Board ruled, apropos of the instant case, "we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." The Board dismissed the 8(a)(1) allegation as follows: "As the [rule] on its face does not discriminate against Section 7 activity, we find that the Respondent did not violate Section 8(a)(1) by maintaining the [rule]." Extrapolating to the instant case, the question remaining is whether the Respondent's rule, banning all argument as to the Union, prounion, and antiunion, is discriminatory on its face.

In applying the Board's holdings and reasoning in *Register-Guard,* I conclude that, in fact, the Respondent's imposed bulletin board restriction violates Section 8(a)(1) because it is discriminatory on its face. In *Register-Guard,* the Board set forth this guideline for analysis of the legality of such rules: ". . . in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status."

Section 7 protects employee activities in support of a union, but also includes the right to refrain from such activity. See *BellSouth Telecommunications, Inc.,* 335 NLRB 1066 (2001). Employees have a Section 7 right to support or oppose the advent of a union, if they so wish. The Respondent's rule, here, precludes both, at least in respect to bulletin board postings. While the Respondent maintains in its brief, that it promulgated the new rule simply to stop postings which contained personal attacks and disparagement, it didn't preclude such posts in the rule, or limit the rule to any postings which contained such matter, or even mention such matter in the rule, but explicitly directed the rule to postings containing "arguments" in favor or opposed to the Union.[68] By its language, the rule does not explicitly ban postings which contain personal disparagement, but simply bans posts containing arguments for against unions. As such, the rule treats Section 7 protected posts differently from any other, and is inherently disparate.

Accordingly, I conclude that the Respondent's imposition of the new bulletin board restrictions at both plants violates Section 8(a)(1), as does the Respondent's removal of such postings pursuant to the rule, as alleged in the complaint. As the Board said in *Fixtures Mfg. Corp.,* supra at fn. 3, a case cited by the General Counsel, "The fact that prounion and antiunion materials were banned does not warrant a contrary result. The important fact is that Sec. 7 material [pro and con] was banned, and other material was permitted."

Rules in Employee Conduct Manual as Violations

Complaint paragraph 11(a) alleges that the Respondent's rule, contained in its employee manual, that prohibits employees form "engaging in behavior designed to create discord or lack of harmony" violates Section 8(a)(1). I found that the Respondent's employee handbook in effect at all times material herein and since at least October 2004, contained the following as prohibited conduct: "Malicious gossip and/or spreading

[67] These dates are pled in the complaint. Smith's testimony doesn't establish exact dates for the movement restrictions, other than the first occurred in mid-January 2007, and the second about a week later.

[68] Indeed, Yeomans testified that if it was so inclined, there were other rules in its employee handbook that it could have enforced that could be used to dealing with the posting of personal attacks on the bulletin boards.

rumors; engaging in behavior designed to create discord or lack of harmony." The complaint only alleges as a violation the portion following the semicolon.

The General Counsel argues in its brief that the rule here is overbroad, that given a reasonable reading the rule could be interpreted to prohibit protected activity in that employee union activity, pro and con, had arguably created "discord" at the plant, and that it, thus, violates Section 8(a)(1). The General Counsel's brief analogizes the instant rule to the Board decision in *Southern Maryland Hospital,* 293 NLRB 1209 (1989), where the Board held that a rule prohibiting "derogatory attacks" to be unlawfully overbroad. The Respondent maintains in its brief that its rule does not interfere with Section 7 rights because its "language is sufficiently vague and ambiguous that it is not clear that any reasonable employee would understand that this rule prohibits protected activity."

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that by reasonable interpretation tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). Further, the Board instructs that in determining the legality of the rule, it must be given a reasonable reading, particular phrases should not be read in isolation, and there should not be a presumption of improper interference with employee rights. *Lafayette Park Hotel,* supra at 825, 827.

The General Counsel does not, and could not, argue that the rule explicitly restricts Section 7 activity. Absent such explicitness, I next examine the circumstances, as instructed in *Lutheran Heritage Village-Livonia,* to determine whether there was a showing of any of the three factors mentioned above. In fact, the rule at issue was utilized as a partial basis to discipline Balczak for his sarcastic remark to another employee vis-à-vis Nykamp's earlier antiunion argument. As found, that rule was highlighted in disciplinary notices given to Balczak, and MacLaren told Balczak that his rule violations were highlighted (or circled). Balczak's conversation or attempt at a conversation with a fellow employee was clearly protected in that Balczak's comments were directed at Nykamp's earlier antiunion propaganda. Thus, inasmuch as the rule has been applied to restrict Section 7 rights, I conclude that it tends to chill the exercise of Section 7 rights, and violates Section 8(a)(1).[69]

Complaint paragraph 11(b) alleges that the Respondent's rule prohibiting "unauthorized soliciting of funds or distributing literature on company property" violates Section 8(a)(1). I found that the Respondent's employee handbook set forth the following as prohibited conduct and prescribed discipline for violation: "Unauthorized soliciting of funds or distributing literature on company property."

Counsel for the General Counsel, citing *Our Way, Inc.,* 268 NLRB 394 (1983), argues, in her brief, that the Respondent's solicitation/distribution rule is facially overbroad and presumptively unlawful in that it prohibits employees from engaging in solicitation during nonworking time and contains no language "indicating to employees that they are free to distribute materials or otherwise solicit while they are on breaks or on their own time." The Respondent mentions, but does not argue, this issue in its brief. I found that the disputed rule was maintained and enforced by the Respondent, and I specifically found that the Respondent imposed discipline on Balczak, at least partially for a violation of the rule.

The governing principle here is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). I agree with counsel for the General Counsel's argument that the Respondent's solicitation/distribution rule, which by its terms prohibits any "unauthorized" solicitation or distribution on the Respondent's property without limitation as to time, is overly broad in that the plain meaning of the rule would preclude such protected Section 7 activity even during an employee's nonworking time such as breaktime or before and after work. Inasmuch as a reasonable interpretation of the rule tends to chill employees in the exercise of their Section 7 rights, I conclude that said rule violates Section 8(a)(1) of the Act, as alleged. *Lafayette Park Hotel,* supra.

Nykamp's February 21, 2007 Letter to Employees

Complaint paragraph 12(a) alleges that Nykamp's February 21 letter to employees solicited grievances and impliedly promised remedies, in response to union activity. I found that the opening paragraph of Nykamp's February 21 letter distributed to employees contained the following: "I continue to strongly believe that union representation will negatively impact our communications, our efforts to resolve problems together, and our ability to compete in a very challenging industry. I remain open to talking about this issue with any individual or group. I am eager to learn and understand the issues and to work toward an acceptable resolution. Please be willing to call me directly…and ask for an opportunity to meet."

Counsel for the General Counsel's brief does not argue which specific words or sentences of Nykamp's February 21 letter actually solicit grievances or imply a promise of remedy, but only states as follows in respect to solicitation: ". . . Nykamp communicated to the employees via the newsletter, specifically soliciting employees to approach him about a particular topic—the union." The Respondent's brief argues, essentially, that the Respondent has a past practice and that given such, "no employee could construe this language as an explicit or implicit promise to remedy solicited grievances." It's not clear which specific part of the letter "this language" refers to.

The principles relevant to deciding the validity of solicitation of grievances allegations are well established, and have been summarized by the Board as follows: "Absent a previous practice of doing so . . . the solicitation of grievances during an

[69] But cf. *Aerodex, Inc.,* 149 NLRB 192,199 (1964), where a discharge was found to violate Sec. 8(a)(3) despite the employee's violation of a rule that prohibited the creation of discord or lack of harmony. While the discharge was found unlawful, there was no allegation and no decision on the legality of the rule.

organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one." *Laboratory Corp. of America Holdings,* 333 NLRB 284 (2001).

Further, an employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign. See, e.g., *Lasco Industries,* 217 NLRB 527, 531 (1975). It is well established, however, that an employer cannot rely on past practice to justify solicitation of employee grievances if the employer significantly alters its past manner and methods of solicitation during the union campaign. *House of Raeford Farms, Inc.,* 308 NLRB 568, citing *Carbonneau Industries,* 228 NLRB 597, 598 (1977).

Here, counsel for the General Counsel, in her brief, concedes that the Respondent has, prior to union activity, allowed "employees to bring workplace issues to its attention, through a system called 'Doughnuts with Dave,' wherein employees have breakfast with Nykamp and talk about work issues, and perhaps through one on one meetings or conversations with Nykamp." Counsel for the General Counsel further argues, however, that the newsletter is a different medium from the Donuts with Dave meetings, and that the newsletter invited employees "to approach him about a particular topic—the union."

The General Counsel's argument is not persuasive, here. For years the Respondent has regularly held the Donuts for Dave meetings for the specific purpose of allowing interested employees to bring up whatever work related issues they wished, including suggestions for the workplace. Nykamp listened to the suggestions and gave responses. Nykamp's missive in the newsletter simply invited employees to continue to do the same thing, albeit without donuts. Further, the wording of the "invitation" in the newsletter is somewhat ambiguous. It says that Nykamp "remains open to talking about this issue . . . ." But the only issue mentioned earlier in the letter is the issue of union representation, not grievances as to workplace conditions.

Under these circumstances, I conclude that the somewhat ambiguous invitation contained in Nykamp's letter of February 21, essentially repeats a practice that the Respondent has engaged in for years, that is to provide a method for employees to periodically meet with Nykamp and bring up whatever workplace concerns they wish to. It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign. *Wal-Mart Stores,* 340 NLRB 637, 640 (2003). That's what Nykamp's invitation consisted of, and I conclude that such did not violate Section 8(a)(1) as alleged.

Complaint paragraph 12(b) alleges that Nykamp, in the same letter of February 21, "solicited employees to report to management the union activities of coworkers and threatened to discipline employees engaged in those activities." I found that Nykamp's letter contained the following: "If you don't want to sign a card, tell the person asking you that you have no interest in signing a card. If you feel pressured, coerced or harassed to sign a card, please report the issue. We enforce our policy prohibiting harassment of any kind."

Counsel for the General Counsel argues that the quoted passage violates Section 8(a)(1) in that it conveys to employees that the Respondent "was interested only in finding out and enforcing its harassment policy against employees . . . who attempted to secure union authorization cards," and that "an employee could reasonably have believed that the Respondent was interested in the identity of those employee who were passing out cards and not in uniformly addressing harassment." The Respondent maintains that the quoted passage encouraged employees to report any unlawful harassment, and "no reasonable employee would interpret Nykamp's statement about reporting coercion or harassment to be a solicitation to report union activities," or "a threat to discipline employee engaging in protected concerted activity." The Respondent does not argue that there were any specific occurrences of harassment or coercion, prounion or antiunion, which led to the passage in Nykamp's letter.

The Board, in considering 8(a)(1) allegations involving an employer's appeal to employees to report instances of being solicited to sign authorization cards, "has frequently found unlawful employers' statements that employees who harass or pressure other employees in the course of union solicitations should be reported to management, who will discipline the offending individuals or otherwise take care of the problem." *Tawas Industries,* 336 NLRB 318, 322 (2001). Such statements violate Section 8(a)(1) "because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities" (footnoted citation omitted), id. But, when the appeal explicitly only seeks reports of unprotected activity, there is no violation. *Champion Home Builders Co.,* 350 NLRB 788, 789 (2007).

In *Champion*, supra, the Board emphasized that in *Tawas,* supra, where it found a violation, the employer's missive focused on words like "coercion," words that lent themselves to subjective interpretation by employees, as opposed to less subjective terms such as "interference with plant production," or threats of harm or job loss used by the employer in *Champion,* where the Board found no violation. In dismissing the allegation in *Champion,* the Board further relied on the employer's explicit affirmation in the message that it would respect the right of employees to solicit and argue for the union.

Here, the Respondent asked employees to report if they "feel pressured, coerced or harassed . . . ." These are words that lend themselves to subjective interpretation akin to the words in *Tawas*. Nykamp's letter containing the words repeats his antiunion views and is part of the Respondent's campaign against the Union. There is nothing in the letter akin to the explicit affirmation of Section 7 rights in *Champion*. The words alleged as Section 8(a)(1), in the midst of a letter conveying

Nykamp's opposition to the Union, would reasonably interpreted by employees to be a request to report union activities to the Respondent. The Respondent distributed Nykamp's letter in direct response to union activity and there is no evidence that any employee, prounion or otherwise, had engaged in such coercion or harassment. See *New Haven Register,* 346 NLRB 1131 fn. 2 (2006). Under these circumstances, I conclude that the Respondent violated Section 8(a)(1) as alleged in paragraph 12(b) of the complaint.

Ben Balczak

Complaint paragraph 14 alleges that the Respondent violated Section 8(a)(3) by imposing on Ben Balczak written reprimand/warnings on January 26 and March 22 and 27, 2007, by imposing a level III written reprimand/warning and 3-day suspension on February 2, 2007, and by assigning Balczak to press operator duties on February 8, 2007. Complaint paragraph 9 alleges that the January 26 reprimand/warning also independently violated Section 8(a)(1), as the discipline prohibited Balczak "from discussing terms and conditions of employment with another employee."

I found that Balczak was active in the union organizing attempt including initially talking about obtaining union representation with fellow employee Dave Smith in October 2006, meeting with a UAW organizer in December 2006 and subsequently speaking to other employees about the Union including calling them at home, and wearing a union pin to work beginning in late January or early February 2007. I further found that Balczak's name was included in the late January, early February 2007 anonymous flyer posted in the plant naming union activists, and that Nykamp, VanderLaan, and other supervisors learned that Balczak was a union organizing activist.

While the record does not establish an exact date on, or by, which Nykamp or other managers learned of Balczak's union activity, I find that it occurred sometime in January 2007, prior to January 24, the date that Nykamp's signed antiunion newsletter was distributed to employees by the Respondent. Thus, Nykamp testified that he had about a hundred conversations in January with employees, during some of which employees specifically named other employees who spoke to them about the Union. The January 24 newsletter acknowledged such. Since Balczak was one of the prime organizers, I find that Nykamp and, hence, the Respondent, learned of Balczak's activity at least by January 24.[70]

January 26, 2007 Reprimand

Complaint paragraph 14(a) alleges that the Respondent violated Section 8(a)(3) by imposing a written reprimand on Balczak on January 26, 2007. I found that on January 26, the Respondent imposed a level II disciplinary warning on Balczak as a result of a 2-minute conversation Balczak initiated with fellow employee Andrea Olescewski during which they exchanged views of the Union, Balczak pro and the other participant anti, and that the Respondent informed Balczak that the discipline was imposed, in part, because he violated the Respondent's rule against "engaging in behavior designed to create discord or lack of harmony," a rule that I concluded violated Section 8(a)(1).

Counsel for the General Counsel, citing *Saia Motor Freight Line, Inc.,* 333 NLRB 784 (2001), argues that because Balczak was disciplined for violating a rule, which itself violated Section 8(a)(1), the application of the rule is, de facto, a violation of Section 8(a)(3), and that the imposition of the discipline also violates Section 8(a)(3) under a *Wright Line*[71] analysis. The Respondent contends in its brief that at the time of the discipline, the supervisor who imposed the discipline, Deering, lacked knowledge of Balczak's union activity, that there is insufficient evidence of animus, and that the Respondent would have disciplined Balczak for idling, even absent his union activity.

Inasmuch as I found Balczak was engaged in union activity during the incident for which he was disciplined, I conclude that the Respondent's imposition of discipline on January 26 violates Section 8(a)(3) as alleged in paragraph 14(a) of the complaint. A *Wright Line* analysis is not necessary to reach this conclusion. *Register Guard,* supra, slip op. at 11 (2007). Further, inasmuch as I already have concluded that the rule under which Balczak was disciplined violates Section 8(a)(1), I also conclude that Balczak's discipline violated Section 8(a)(3).

The Respondent contends that Balczak was disciplined for "idling," but there is no evidence in the record that the Respondent prohibited brief conversations between employees during the workday. Indeed, the Respondent, in its brief, concedes that "[i]t is not uncommon for employees to have brief conversations on the floor." Deering testified that a minute of "idling" would probably not provoke him to issue discipline, but that he might if it lasted 5 or 10 minutes. I found that Balczak's conversation lasted about 2 minutes.

Even applying *Wright Line,* I conclude that Balczak's discipline violated Section 8(a)(3). Thus, I found that Balczak engaged in union activity, the Respondent was aware of such,[72] and the Respondent displayed animus by Nykamp's repeated written expression to employees of his opposition to the Union, and the other violations of the Act found herein. I further conclude that Balczak's conversation was within the Respondent's policy and practice of allowing brief conversations, and was not something for which the Respondent would normally have imposed discipline, except for the ongoing organizational activity.[73]

Finally, counsel for the General Counsel maintains in her brief that the portion of Balczak's disciplinary writeup threatening further disciplinary action for "any future incidents of this

[70] Nykamp knew of Balczak's union activity, and therefore the Respondent knew. *State Plaza Hotel,* 347 NLRB 755, 756 (2006).

[71] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[72] The Respondent contends, in brief, that the supervisor who imposed the discipline, Deering, was unaware of Balczak's union activity. Deering testified that the decision to impose discipline was made by Human Resources Generalist Hirdes, not by himself.

[73] The Respondent introduced evidence of other instances where it disciplined employees for idling. None of them appear to be analogous to the Balczak incident in which an employee engaged in a 2-minute conversation with a fellow employee. Record testimony indicates that such brief conversations between employees are the rule, not the exception for which discipline is imposed.

nature" violates Section 8(a)(1) because "it can only be surmised that it was further union activity that was [being] prohibited." Inasmuch as I have already found both the rule and the discipline to be in violation of the Act, and will order appropriate remedies, any additional findings and remedies would be duplicative. I, thus, decline to find this additional violation as to the same discipline, as alleged in complaint paragraph 9.

February 2, 3-Day Suspension

Complaint paragraph 15(a) alleges that on February 2, 2007, the Respondent imposed a level III written reprimand/3-day suspension on Balczak in violation of Section 8(a)(3). I found that on February 2, at Balczak's request, Balczak and employee Huy Pham met on the plant floor by the scrap hopper machines, that Balczak attempted to hand Pham some union-printed materials which Pham declined, that Balczak told Pham she could read the materials in the bathroom, that Pham declined and told Balczak she didn't want anything to do with "this," and that the entire conversation took about 2 minutes. I further found that later that same day MacLaren, with Yeomans present, imposed a level III 3-day suspension on Balczak for the incident with Pham, told Balczak that the discipline was based on the employee handbook and that his violations were circled (highlighted), and that among the highlighted violations was the following: "Unauthorized soliciting of funds or distributing literature on company property."

Counsel for the General Counsel, in her brief, argues that because Balczak was suspended for violating an illegal no solicitation/distribution rule, the discipline violated Section 8(a)(3), and that, in the alternative, applying a *Wright Line* analysis, the discipline would violate Section 8(a)(3). The Respondent generally maintained that Balczak was disciplined for idling, other employees have been disciplined for idling before and after the inception of union organizational activity, and that the Respondent utilized its progressive discipline policy in imposing the suspension.

Because the Respondent imposed the suspension on Balczak, at least in part, because he assertedly violated the Respondent's no solicitation/distribution rule, a rule which I concluded violated Section 8(a)(1), I conclude that said discipline violates Section 8(a)(3) of the Act. "Any disciplinary action taken pursuant to an unlawful no-solicitation rule is . . . unlawful, analogous to the 'fruit-of-the-poisonous-tree' metaphor often used in criminal law." *Saia Motor Freight Line, Inc.,* supra at 785 (citations omitted).

Further, I agree with counsel for the General Counsel that even applying a *Wright Line* analysis, the result would be the same. Thus, I found that Balczak engaged in union activity, the Respondent was aware of such at the time it imposed discipline, the Respondent has demonstrated its antiunion animus as discussed herein, and that, therefore, the burden switches to the Respondent to demonstrate it would have suspended Balczak notwithstanding his union activity. For the reasons discussed above in respect to Balczak, the Respondent failed to meet this burden.

February 8, Assignment to Press Operator Duties

Complaint paragraph 15(b) alleges that on February 8, 2007, the Respondent, in violation of Section 8(a)(3), assigned Balczak to press operator duties. I found that upon returning to work on February 8 from the 3-day suspension, Balczak told MacLaren and Deering that if they wanted to keep an eye on him, to reassign him to the job of "hanging coils." Balczak's request followed MacLaren's comment that he didn't want "you guys"[74] to say anything to Pham going forward.[75] Counsel for the General Counsel, citing *Nortech Waste,* 336 NLRB 554 (2001), and other cases, argues that while employers have the general right to assign the duties and jobs of employees, the *Wright Line* analysis should be applied, that sufficient evidence of union activity, knowledge, and animus, has been presented shifting the burden to the Respondent, and that the Respondent failed to meet that burden. The Respondent maintains that Balczak was moved at his own request and, thus, would have been moved notwithstanding union activity.

Here, the Respondent has the more persuasive argument. Balczak's request to be reassigned to "hanging wire" followed MacLaren's instruction to not contact Pham about her apparent complaint to management about her conversation with MacLaren and, logically, was a response to that instruction. In other words, Balczak, concerned about being disciplined again, suggested that he be placed on a job where he would not likely be accused of approaching Pham. Even though Balczak suggested he be reassigned to wire hanging, there is no dispute that his request initiated his reassignment by the Respondent, albeit to operating a press. While counsel for the General Counsel, in her brief, suggested that Balczak's request was "semi-sarcastic," I find no support for such in his testimony. Thus, while I conclude that counsel for the General Counsel has met her initial *Wright Line* burden, I further conclude that the Respondent has demonstrated that it acted on a request initiated by Balczak, and would have reassigned him notwithstanding his union activity.[76]

March 22 Reprimand

Complaint paragraph 14(b) alleges that the Respondent on March 22, 2007, imposed a written reprimand on Balczak, in violation of Section 8(a)(3). I found that on March 22 Deering imposed a level I reprimand on Balczak, memorialized in a disciplinary action document signed by Deering and Hirdes,

[74] There is insufficient evidence in the record from which I could conclude to whom the "you guys" referred to, except that it, at least, included Balczak. Obviously, it could have been a reference to union supporters, to Balczak's friends, or to some other grouping.

[75] Based on the context, I find the instruction to not say anything to Pham to be in the sense of not retaliating against her for apparently reporting her conversation with Balczak to the Respondent, rather than not to talk to her about the Union. There is no allegation that such instruction violated Sec. 8(a)(1).

[76] Counsel for the General Counsel also argues that it's not likely that Balczak requested reassignment to a press, because that is something he could have accomplished within the cell, without seeking permission from management. While reassignment within a cell is within the purview of the cell's members, such reassignment could include press operation, wire hanging, or material handling. Regardless of whether Balczak specifically requested reassignment to operating a press as the Respondent contends, or wire hanging as I found, the fact remains that he requested reassignment, and that his request precipitated his reassignment.

which asserted that on February 19, Balczak produced certain parts, that when the Northridge plant began to use the parts on March 20, it was discovered the parts were mixed, and that Balczak needed to pay closer attention. I also found that when Balczak re-sorted the parts, pursuant to Deering's instructions, he found no mixed parts and reported such to Deering. The only evidence supporting the assertion upon which the discipline was based, that Balczak produced mixed parts, is the hearsay testimony of Deering to the effect that an unidentified employee in the Northridge quality control department so informed Deering on the phone.

As to this allegation, the counsel for the General Counsel contends that she met her *Wright Line* burden and demonstrated that Balczak's union activity was the Respondent's motivation, and that the Respondent failed to meet its resultant burden of establishing that it would have disciplined Balczak absent union activity. The Respondent maintains that it properly disciplined Balczak for mixing parts, an offense for which it has frequently disciplined other employees.

Under *Wright Line,* to demonstrate a violation of Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's action. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. "To sustain his initial burden, the General Counsel must show: (1) that the employee was engaged in protected activity; (2) that the employer was aware of the activity; and (3) that the activity was a substantial or motivating factor for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine." *Naomi Knitting Plant,* 328 NLRB 1279 (1999) (citations omitted).

Here, as found, Balczak was a prime union activist. By late January, early February 2007, Balczak regularly wore a union pin to the plant each payday. At about the same time, the list was posted in the plant naming Balczak, among others, as a union activist.[77] Nykamp had hundreds of conversations with employees in January and February, during some of which the employees named union activists. Further, the Respondent was aware of the February 2 incident for which I concluded the Respondent illegally suspended Balczak for attempting to provide union literature to Pham. Finally, based on the Respondent's various violations of the Act found herein, and its other expressions of antiunion sentiment including Nykamp's missives to employees, there is ample evidence from which to conclude that the Respondent displayed antiunion animus. Thus, I conclude that the General Counsel has sustained its *Wright Line* burden.

I further conclude that the Respondent has failed to meet its resultant burden. The only evidence produced by the Respondent in support of its decision to discipline Balczak for the asserted mixed parts offense is the testimony by Deering of a phone call with an unnamed employee in quality control to the effect that there were mixed parts. There was no other evidence that, in fact, Balczak caused mixed parts to be placed in a gondola. The quality control employee did not testify and Deering's testimony included nothing about observing the mixed parts. To the contrary, Balczak credibly testified that when he re-sorted the parts he observed no mixed parts, and so informed Deering.[78] The Respondent's quality audit log, a document utilized by the Respondent in its business to record such and similar errors, contains no specific entry for mixed parts on or near the date of March 20. Finally, Deering testified that he didn't know, and was never informed, as to how many alleged mixed parts there were.

The failure of the Respondent to produce a modicum of credible evidence in support of its assertion that formed the basis of its discipline of Balczak is a factor that I have weighed in reaching my conclusion that the Respondent has not met its burden and that the discipline was pretextual. See, for example, the Board's findings in *Signature Flight Support,* 333 NLRB 1250, 1251 (2001), where the employer failed to produce credible evidence to support the asserted basis for discipline.

Further, while the record contains evidence of disciplinary warnings imposed on other employees for mixed parts or labeling errors, in at least one of those instances Deering, who testified that he can exercise discretion in deciding whether or not to impose discipline, decided to simply write a note to the file rather than impose discipline on an employee who mislabeled parts because "[y]ou have had no other issues of this nature currently in your file."[79] Deering's discretion is borne out by the testimony of press operator Segers to the effect that when he made a labeling mistake, Deering simply spoke to him about it, but did not impose discipline.[80] Deering further testified that he had no personal knowledge that Balczak had ever operated a press before his then current assignment and that Balczak had operated the press for less than 2 weeks when the asserted mistake occurred. Under these circumstances, having concluded that the General Counsel has met its *Wright Line* burden, that the Respondent has fallen short, and that the evidence demonstrates that the basis for Balczak's discipline is pretextual, I conclude that the discipline violates Section 8(a)(3) of the Act as alleged.

[77] I reject the Respondent's argument in its brief, that the Respondent didn't rely on the anonymously posted listed for information as to the identities of union activists. The findings herein as to Dykstra's comments to Segers and Bonnville about the list, demonstrate that the Respondent did not disregard the information in the list as to who the union activists were.

[78] Deering testified that he wasn't sure whether Balczak told him that there were no mixed parts or a handful. Balczak testified that Deering asked him whether he found any mixed parts, that he told Deering he had not, and that Deering "acted very surprised." Deering was uncertain in his testimony. Balczak's testimony was detailed and explicit. I credit Balczak.

[79] R. Exh. 20.

[80] Segers' credited testimony.

March 23 Reprimand

Complaint paragraph 14(c) alleges that on March 27, 2007,[81] the Respondent, imposed a written reprimand on Balczak, in violation of Section 8(a)(3). I found that on March 23, Deering, with Hirdes present, gave a level II disciplinary action memo to Balczak that stated that on March 22 Balczak mislabeled right side parts as left side and that there also were mixed parts. Balczak signed the disciplinary memo, but testified that he did not agree that he had either mislabeled or mixed the parts. The discipline was imposed at level II because of the prior level I discipline imposed on March 22. Both counsel for the General Counsel and the Respondent, repeat essentially the same arguments made as to the March 22 discipline allegation.

As concluded in respect to the March 22 reprimand, and for the same reasons, the General Counsel has established by a preponderance of the evidence that animus against Balczak's union activity was the Respondent's motivation for the March 23 discipline. Thus, I've concluded that Balczak participated in union activity, the Respondent knew that, and the Respondent has displayed animus in respect to the activity.

I further conclude, essentially for the same reason as in respect to the March 22 discipline, that the Respondent has failed to demonstrate that it would have imposed discipline on Balczak on March 23, even absent union activity. Thus, almost no evidence, beyond the accusation and imposition of discipline, was presented to support the Respondent's assertion that Balczak mislabeled and mixed parts.

Under *Wright Line,* once the General Counsel has met his initial burden, the Respondent must persuade that it would have imposed the discipline notwithstanding the union activity. At a minimum, here, that evidence should include something demonstrating that the violation for which discipline was imposed, actually occurred. Yet the record contains little, if anything, from which I could make such a conclusion. Accordingly, I conclude that the Respondent has failed to meet its burden to demonstrate that Balczak would have been disciplined even absent his union activity, and that the Respondent violated Section 8(a)(3) as alleged in paragraph 14(c) of the complaint.[82]

Glenn Gentz

I found that Gentz was employed by the Respondent at Three Mile from 1993 until his discharge on March 27, 2007. Gentz, as opposed to Balczak and Smith, was minimally involved in union organizational activity, including speaking to fellow employees about the Union "a couple of times a day." The record contains no detail as to these conversations such as who specifically he spoke to, where the conversations took place, what was said, or when the conversations began. Nevertheless, I also found that Gentz' name was included in the list of asserted union activists posted in the plant in late January/early February 2007.

[81] The complaint pleads the discipline occurred about March 27. The evidence demonstrates that the correct date is March 23.

[82] Except that the discipline and violation occurred on March 23 rather than March 27 as alleged in the complaint.

February 21 Reprimand

Complaint paragraph 16 alleges that the Respondent, on February 21, 2007, imposed a level I reprimand on Gentz assertedly for an incident that occurred on February 19. I found that on February 19 Gentz, a hi-lo operator, was assisting a press operator with a problem at a time when the operation he had been working on was down, had walked to the back of the press to observe its operation with a potato chip bag in hand, was approached by Deering who told him that he should be checking parts on a different press, and responded to Deering that the other press had been down. I found that when Deering handed Gentz the disciplinary memo, Gentz explained he had been monitoring the press feed, and that Deering responded that while that could be possible, he was going forward with the discipline because there were other problems he wanted to correct, apparently referring to asserted complaints form other employees as to Gentz, which I found there was no evidence to support.

Counsel for the General Counsel argues in her brief that Gentz was involved in union activity which the Respondent was aware of or suspected because of the posting of the list, that the basis of the discipline was unsupported by evidence, and that the discipline was pretextual. The Respondent, in its brief, maintains that Gentz was disciplined for cause, that Deering observed Gentz idling during the February 19 incident and had received reports of such from other employees, and that, in any case, the Respondent was unaware of Gentz' union activity, if any.

I agree with the Respondent that there is insufficient evidence from which to conclude that the Respondent had specific knowledge of Gentz' minimal union activity of talking to other employees about the union issue. But, I further conclude, as maintained by the counsel for the General Counsel, that the Respondent, in fact, perceived that Gentz was a union supporter, based on the posting of the asserted supporter list in late January or early February and the Respondent's reaction to the posting. As the Board has held, "In establishing that an employer's opposition to union activity was a motivating factor in an employer's decision to discharge an employee, it is . . . immaterial that the employee was not *in fact* engaging in union activity as long as that was the employer's perception and the employer was motivated to act based on that perception." *Dayton Hudson Department Store Co.,* 324 NLRB 33, 35 (1997) (emphasis contained in original).

While the Respondent argues that the list was posted anonymously, and was not, and could not be, utilized by the Respondent to discern which employees were union activists, the words of Vice President Manufacturing Dykstra to employees Segers and Bonnville, in discussing their complaints about the posting of the list, belie the Respondent's defense. Thus, when Segers demanded of Dykstra to know why his name was included on the list, Dykstra replied, "You obviously were seen attending union meetings or talking up the union." Dykstra added that if people weren't happy there, maybe the Respondent should see that they're not working there, and that people were going to have to earn back the Respondent's trust. Further, in response to Bonnville's complaint about the list, Dykstra at first told him that he'd seen a list of 35 to 38 em-

ployees who had attended union meetings. Rather than disregarding the names posted on the list, Dykstra's comments demonstrated that the Respondent took the list, and the names contained therein, seriously.[83]

Applying *Wright Line* to this allegation, I conclude that the Respondent perceived that Gentz was involved in union activity, that, for reasons discussed above, the General Counsel has demonstrated the Respondent's displayed animus towards the Union, and that, thus, the General Counsel has met his initial burden. I further conclude that the Respondent has not met its resultant burden of demonstrating that the discipline would have been imposed even absent its perception that Gentz was a union activist.

Thus, Deering testified that the discipline was initiated because he observed Gentz standing by a press and "[a]t the time I believe[d] he was idling." But when Deering presented the disciplinary warning to Gentz, and was informed by Gentz that, in fact, he wasn't idling but was assisting the press operator, Deering, acknowledged Gentz' response, but nevertheless went through with the discipline, assertedly based on reports from other employees concerning Gentz' work.

Deering's testimony that "At the time [that he observed Gentz] I believe[d] he was idling" (emphasis supplied) implies that he accepted Gentz' explanation that he was assisting the press operator. Indeed, there is no evidence to dispute Gentz' credible testimony that he was not, in fact, idling, but was assisting the press operator by observing the operation of a malfunctioning machine. As noted earlier, in view of the lack of supporting evidence and Deering's inability on the stand to name the allegedly complaining employees, I do not credit Deering's testimony that other employees complained about Gentz. Under these circumstances, with there being no credible basis for the Respondent's discipline of Gentz, I conclude that the Respondent has failed to meet its burden, and that the discipline was pretextual. Accordingly, I conclude that the imposition of the reprimand on Gentz violated Section 8(a)(3) as alleged in paragraph 16 of the complaint.

March 27 Discharge

Complaint paragraph 17 alleges that on March 27, 2007, the Respondent discharged Gentz in violation of Section 8(a)(3). Counsel for the General Counsel argues that she has met her *Wright Line* burden for the reasons set forth above as to Gentz' February 21 discipline, and that because the evidence demonstrates that the discharge was pretextual, the Respondent has failed to carry its burden that it would have discharged Gentz absent union activity. The Respondent maintains that the General Counsel failed to meet his initial burden because Gentz' union activity, if any, was minimal, because there is insufficient evidence that the Respondent had knowledge of Gentz' union activity, and because animus was not proved. The Respondent also maintains that even if it's found that the General Counsel met his burden, the Respondent has demonstrated that it would have discharged Gentz notwithstanding his union activity.

[83] Human Resources Generalist Hirdes also testified that he believed those named on the list were in favor of the Union.

For the reasons set forth above, including Gentz' name appearing on the posted list, and the Respondent's reaction to the list as illustrated by Dykstra's comments, I conclude that the Respondent perceived that Gentz was a union activist. Whether or not Gentz engaged in union activity, or the extent thereof, is immaterial because the Respondent perceived Gentz as an activist. *Dayton Hudson Dept. Store Co.,* supra at 35. As further discussed above, I also conclude, based on Nykamp's comments in the Respondent's newsletters and the various other violations found herein, that the Respondent maintained animus towards union activity. Thus, I agree with the counsel for the General Counsel, that she has met her initial *Wright Line* burden.

I further conclude that the Respondent has failed to meet its burden of demonstrating that it would have discharged Gentz even absent its perception of his union support because the evidence is compelling that Gentz' discharge was pretextual. Gentz was employed by the Respondent for about 14 years and, according to Yeomans, had no prior disciplinary record for threatening behavior or issues with other employees. Yeomans testified that she didn't bother to look at Gentz' personnel file after the incident was reported to her.

Objectively viewing the evidence the Respondent itself gathered in its investigation, the initial incident with Calderon was, at worst, a 50/50 proposition, with both apparently and approximately equally at fault (Gentz could have sounded his horn; Calderon could have watched where he was walking). The resulting incident also showed equal parts of blame; Calderon should not have returned to the scene to make additional sarcastic comments to Gentz, and Gentz should not have touched Calderon. Gentz engaged in no threats, pokes, or other physical acts against Calderon (nor did Calderon against Gentz).

Further, while the Respondent's counsel asserts in his brief that "RVI disciplined Gentz for violating the Workplace Violence Policy," and MacLaren testified that he told Gentz he was being discharged for "physical intimidation or threatening," Yeomans testified that he was also discharged because he lied about the incident, and that the lie consisted of not mentioning to Hirdes and MacLaren, during the investigation, that he had touched Calderon. The Respondent does not contend, in its brief, that Gentz was discharged for any reason other than the incident with Calderon, although it does state the Respondent's belief that Gentz was not truthful because he did not mention that he touched Calderon.

I am not persuaded that Gentz lied to the Respondent during its investigation of the incident, or that such presented a legitimate basis, or additional basis, for its decision to discharge Gentz. Hirdes and MacLaren, in their investigation of the incident, simply asked Gentz what happened and never asked Gentz whether he touched Calderon. The first time the Respondent made the assertion to Gentz that to touched Calderon, at the discharge interview, Gentz immediately admitted physical contact with Calderon.

The Respondent argues that neither Hirdes nor MacLaren specifically asked Gentz whether he touched Calderon because the Respondent's normal investigative practice is not to ask specific questions, just general questions such as "what hap-

pened?" or "did anything else happen?" Yet MacLaren testified that he specifically asked Gentz during the interview whether any words were exchanged between Gentz and Calderon. Based on the asking of the specific question, and the concomitant failure to ask the more relevant specific question of whether there was any physical contact between the two, it appears that the Respondent was more interested in constructing a pretext for discharge, rather than an objective investigation of what occurred. Further evidence of this intent includes the logistics of the investigation, i.e., multiple solicitations of versions of the incident from Calderon and Birhanu before Gentz was even contacted.

Finally, the evidence of the Respondent's past practice in dealing with incidents of violence or work conflict in the workplace, does not show a pattern that would place the treatment of Gentz within the norm as is argued by the Respondent, but instead tends to show disparate treatment. The Respondent cites eight examples of employees suspended solely for inappropriate or threatening language, and in one case discharged for "less egregious behavior," involving a verbal altercation "when management could not verify that any physical confrontation occurred." But none of those cited instances is analogous to the Gentz discharge. The discharge cited by the Respondent involved an employee who had been repeatedly previously disciplined for workplace behavior problems, prior to discharge. Gentz had no such previous discipline. None of the other nine instances of discipline cited by the Respondent involved discharge.

Counsel for the General Counsel, in her brief, cites evidence of previous discipline imposed on various employees as examples of the asserted disparate treatment of Gentz. These include a level II written reprimand that the Respondent imposed on Martha Hernandez on January 25, 2008, for an altercation with another employee that involved pushing, a level III 3-day suspension up to 3 days imposed on employee Phil Harrington on May 3, 2007, for threatening another employee with a beating, a level III 1-day suspension imposed on employee Craig Eastman on July 19, 2004, for physical contact with and inappropriate language to another employee, and a level III 3-day suspension imposed on employee Mike Long on October 24, 2007, for threatening to harm other employees and himself in circumstances where he had made similar threats in the past.

Two of the four incidents cited by the General Counsel involve altercations that included physical contact and inappropriate language. The other two involved direct threats of physical harm to other employees. All of these incidents seem more severe than the Gentz-Calderon confrontation during which Gentz pulled on Calderon's shirt and there were no threats of violence or improper language. The Respondent argues in its counsel's brief that incidents that occurred before Yeomans was hired as HR manager in October 2004, should not be used for comparison to Gentz' discharge. But the incidents cited above all occurred after Yeomans was hired, except for the Eastman discipline, which was initiated by HR Generalist Hirdes, a principal player in the Gentz discharge.

The Eastman disciplinary action form, generated by Hirdes, states that the Respondent imposed a 1-day suspension and demotion on Eastman and specifies the following in the management comment section, "You used inappropriate language and made physical contact with a coworker which is clearly unacceptable behavior." The Respondent maintains, in its brief, that the Eastman discipline is distinguishable because both employees involved were disciplined, that Eastman admitted he pushed the other employee, did not try to conceal what occurred, and apologized to the other employee.

The Eastman occurrence factually resembles the Gentz/Calderon confrontation in that it involved a low level of physical contact, but the Respondent's disciplinary memo to Eastman also asserts that he used inappropriate language, which is absent in the Gentz incident. I find that the Eastman incident, for which he received a 1-day suspension and demotion, to be approximately comparable to, if not more severe than, the Gentz/Calderon incident, for which Gentz was discharged. As discussed above, I do not find that Gentz lied to the Respondent about the incident. I also find the other incidents cited by the counsel for the General Counsel, and discussed above, to be approximately comparable to the Gentz incident, but for which the Respondent imposed discipline less severe than discharge. Such disparate treatment is a factor to be considered in deciding unlawful motivation. *Robert Orr/Sysco Food Services,* 343 NLRB 1183, 1184 (2004). Based on the above, I conclude that the Respondent has failed to meet its burden of demonstrating that it would have discharged Gentz even absent its perception of his union activity. Accordingly, I conclude that the Respondent's discharge of Gentz violated Section 8(a)(3) of the Act, as alleged in complaint paragraph 17.

Smith, Job Jeopardy Agreement and Threat to Discharge.

Complaint paragraph 18 alleges that on January 7, 2008, the Respondent required Dave Smith to enter into a job jeopardy agreement (JJA) in violation of Section 8(a)(3), and that the JJA required that Smith attend counseling sessions, that he comply with any recommendations of the counseling agency, that he be off work on January 7, 2008, and that he be responsible for any costs associated with counseling sessions. The JJA provided that if the Respondent determined that Smith failed to meet and maintain the JJAs requirements, his employment would be terminated.

Complaint paragraph 13 alleges that about January 3, 2007, Nykamp threatened employees with discharge because of their activities on behalf of the Union. This allegation alludes to Nykamp's asserted invitation to Smith to quit his employment with the Respondent. As to this issue, I found that at the February 3 meeting, Nykamp told Smith, "It sounds like you're not happy here, and you need to make a decision. Either stay here and be unhappy, or go someplace else and be happy."

I found that Smith had been employed by the Respondent since July 1997, except for a 9-month period beginning in July 2000. I further found that Smith was a prime union activist, that he originated contact with the Union, that Smith talked to other employees in support of the Union including calls to their homes, that he wore a UAW T-shirt to work each payday and a UAW pin other days, that he distributed union literature to employees at shift break from the sidewalks by the Three Mile and Northridge plants, that he was cautioned twice by man-

agement to stay in his own department,[84] that Yeomans told Nykamp that Smith and Balczak were encouraging union sign-up, and that shortly after he transferred to the Northridge plant in August 2007, he told Plant Manager VanderLaan that "we will continue our union organizing efforts."

Counsel for the General Counsel contends that under a *Wright Line* analysis, she has demonstrated that Smith participated in union activity, that the Respondent was aware of such, that the Respondent's animus was demonstrated by the various other illegal actions engaged in as part of its campaign against union organization, and that the Respondent has failed to show that it would have placed Smith on the JJA absent his union activity. The General Counsel further argues that because Smith was discussing issues involving union activity during the January 3 meeting with Nykamp and VanderLaan, and was disciplined for the discussion, the discipline violated Section 8(a)(3).

Further, citing *American Steel Erectors,* 339 NLRB 1315 (2003), the General Counsel maintains that because the Respondent imposed the discipline for Smith's actions in the course of protected activity, the appropriate test for a violation should be whether Smith's actions or words during the discussion were so severe or egregious as to remove them from the Act's protection. Finally, citing *Bell Burglar Alarms, Inc.,* 245 NLRB 990 (1979), counsel for the General Counsel posits that in the circumstances here, an invitation to quit constitutes an implied threat of discharge for union activity.

Contrariwise, the Respondent argues that the General Counsel has failed to prove animus, that the Respondent has demonstrated that Smith was placed on the JJA because of his words and actions not involving the Union, and that the Respondent has met its burden of showing that it would have placed Smith on the JJA even absent his union activity. The Respondent further maintains that Nykamp did not threaten Smith during the January 3 meeting, that Nykamp's words did not constitute a threat and Smith did not feel threatened, and that whatever Nykamp said to Smith related to Smith's accusation that Nykamp was a liar, not to union activity.

Initially, I conclude that the subject matter of the January 3 meeting attended by Smith, at VanderLaan's instruction, and by VanderLaan and Nykamp, directly and indirectly involved Smith's union and associated activity, and that the meeting arose out of such activity. The genesis of the January 3 meeting was the earlier meeting in late August or early September, 2007, to which Smith was invited after telling VanderLaan that there were unresolved issues and that union organizing activities would be continuing. The January 3 meeting was generated because Nykamp was upset that Smith referred to Nykamp as being a liar. But, Smith called Nykamp a liar because Smith believed that Nykamp had failed to follow through on assurances made at the earlier meeting in respect to Smith's complaint as to the discipline of two employees, a complaint raised in the context of why employees wanted a Union.

The January 3 meeting, thus, arose out of a prior meeting in August/September during which union or protected activity was discussed, a subsequent discussion between Smith and Nykamp as to Nykamp's followup to the earlier meeting, and Smith's "liar" comment to VanderLaan concerning Nykamp's follow-up. At the January 3 meeting, Smith talked about why employees needed a union and his view that Nykamp treated union supporters differently. Smith did not use the "liar" epithet at this meeting.

The common thread to all of these events involved Smith's actions in furtherance of union organization, including telling VanderLaan that there were still problems and he was going to continue with union organization, telling Nykamp what the problems were including the discipline of two employees, complaining about Nykamp's perceived failure to follow up as to the discipline, and accusing Nykamp of treating union supporters differently. Section 7 activity was integral to all of these meetings, and carried with it its normal protection.

I agree with the General Counsel that Nykamp's invitation to Smith, a prime union activist, to the effect that if he wasn't happy there, he should find another job, constituted a threat of discharge, and I agree that in the context of the protected activities discussed above, the threat was directed at those activities. The Respondent's argument, in its brief, that "no reasonable person could construe" Nykamp's invitation to be a threat is not persuasive and, indeed, the Board has viewed such statements to be a threat of discharge. See *Bell Burglar Alarms, Inc.,* supra at 990, where the Board interpreted a similar invitation from an employer's owner as conveying a threat of discharge. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 13.

The Respondent's argument that "Nykamp's comments to Dave Smith were specifically related to Dave Smith calling Dave Nykamp a liar," and unrelated to any union activity, is simply not borne out by the evidence and the context. As found above, the entire context of both meetings involved the union organizational attempt. More specifically, at the January 3 meeting, where Nykamp's comments occurred, Smith told Nykamp why the employees wanted a union and accused Nykamp of treating union supporters differently. The evidence is persuasive that rather than simply being a response to the "liar" epithet, which was not used at the January 3 meeting, Nykamp's invitation for Smith to work somewhere else was generated by Nykamp's frustration at Smith's continuing union activity and associated complaints to Nykamp.

Finally, I reject the Respondent's assertion in its brief that implies that because "Smith did not feel threatened during this meeting," Nykamp's comment cannot be construed as a threat. The Board does not judge the legality of such comments based on the subjective reaction of the recipient. "The legality of an employer's conduct does not turn on whether the employee feels threatened." *Bell Burglar Alarms, Inc.,* supra at 990. Accordingly, I conclude that Nykamp's invitation to Smith to look for work elsewhere constituted a threat to discharge, and violated Section 8(a)(a1), as alleged in complaint paragraph 13. See also, *Hoytuck Corp.,* 285 NLRB 904 (1987).

I further conclude that the Respondent's imposition of the JJA on Smith violated Section 8(a)(3) because the Respondent imposed the JJA based on Smith's words and actions during the course of Smith's protected activity during the January 3 meeting, which were part of the res gestae of union activity. Noth-

[84] Which I concluded violated the Act.

ing that Smith said or did at the meeting was so egregious as to remove the mantle of protected activity. Thus, Smith did not use the epithet "liar" during the January 3 meeting, and the Respondent does not assert, or argue in its brief, that he was placed on the JJA for such. Instead, the Respondent maintains that Smith's usage of the phrase "exit strategy" combined with his actions during and immediately after the meeting removed Smith's actions from Section 7 protection, and led the Respondent to become fearful of Smith's behavior and to place him on the JJA.

The Respondent, in its counsel's brief, citing *Tenneco Packaging, Inc.,* 337 NLRB 898 (2002), argues that it did not violate Section 8(a)(3) by imposing the JJA on Smith, because it acted over concern as to Smith's usage of the "exit strategy" phrase and Smith's "incoherent statements, gestures, red face and dilated pupils." I note that *Tenneco* involved a *Wright Line* analysis in which the Board affirmed the judge's conclusion that the General Counsel failed to show that union activity was a motivating factor, and the employer established that it would have taken the same action even in the absence of union activity. In reaching his conclusions, the administrative law judge wrote as follows:

> I have resolved the question of whether Respondent acted in good faith or out of animus towards union organizational efforts on the basis of the factual record before me. That record includes testimonial evidence relating to McClain's behavior, evidence establishing an emergency involuntary admission of McClain to the Charter Rivers Behavioral Health Systems facility located in Lee County, South Carolina, and an Order of a Probate Court finding, inter alia, that McClain was mentally ill and that there "is a likelihood of serious harm to himself or others."

The administrative law judge, further, found that the employee involved had a past history of anger, anger management problems, and unusual actions in the plant.

Here, there is no evidence that Smith had a history of violence in the plant, anger management problems, threats to others, or a history of irrational behavior. Instead, the Respondent relies on Smith's "exit strategy" comment and his reddened face, dilated pupils, and gestures during the January 3 meeting. The Respondent, in its counsel's brief, also asserts that Smith, "began chattering about various random and seemingly disconnected topics, became increasingly agitated, and refused to look at either Dave Nykamp or Ron VanderLaan."

Upon a careful review of the evidence as to Smith's behavior and words at the January 3 meeting, I conclude that there was minimal objective evidence from which the Respondent could conclude that Smith presented a danger to others or to himself. I found that, in fact, Smith was not speaking in tongues or randomly "chattering." Further, the fact that Smith's face may have reddened or that his pupils dilated may simply have been an indication that the meeting was somewhat tense or that Smith was nervous in a somewhat confrontational meeting with the Respondent's owner. In sum, I do not find that Smith's words and conduct, viewed objectively, rose to a level that was threatening. Further, when considered along with factors such as there being no evidence that Smith had any history of violence, or threats, or similar behavior, and the animus displayed by the Respondent against union activity, including its prior actions limiting Smith's movements within the plant(s), I conclude that the Respondent was motivated to place Smith on the JJA by his role in union organizing, and not by his actions and words on January 3, which were merely a pretext. Neither Smith's words or actions, or both, rose to a level of egregiousness or severity so as to remove the Act's protection from his conduct.

The above analysis finding a violation is based on my conclusion that Smith's actions and words on January 3 were part of the res gestae of protected activity and that he was disciplined therefor. However, even applying a *Wright Line* analysis, I would come to the same conclusion. Thus, Smith was a prime union activist, the Respondent had knowledge of such, and had previously displayed its animus to union organizational activity in general and to Smith's in particular. For the reasons discussed above, including the pretextual nature of the asserted reasons, the Respondent failed to show it would have placed Smith on the JJA even absent his union activity.[85] Thus, under *Wright Line,* I would also conclude that the Respondent's imposition of the JJA on Smith violated Section 8(a)(3) of the Act.

## CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Glenn Gentz on March 27, 2007, and imposing on Gentz on February 21, 2007, a written reprimand/warning, by imposing a Job Jeopardy Agreement (JJA) on Dave Smith on January 7, 2008, and by placing restrictions on Smith's movements within plants on January 16 and 24, 2007, and by issuing written reprimands/warnings to Ben Balczak on January 26 and March 22 and 23, 2007, and a written reprimand/warning and 3-day suspension on February 2, 2007, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) of the Act.

4. By the following actions on the dates set forth below, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act:

(a) On January 24, 2007, created the impression among its employees that their union activities were under surveillance.

(b) On January 16 and 24, 2007, placed restrictions on employee movements in its plants in response to employees' union activities.

[85] The Respondent introduced evidence of five other JJAs that it has applied to employees since 2002. The circumstances are as follows: a supervisor who excessively visited internet chat rooms on the job; alcohol and drug policy violation; repeated confrontations with other employees; and confrontational/disruptive behavior and insubordination. None of the circumstances described in those JJAs are analogous to Smith's case.

(c) On February 2, 2007, promulgated a rule prohibiting the usage of employee bulletin boards at Three Mile and Northridge for posting "union/nonunion arguments," and removed said materials from the Three Mile bulletin board.

(d) Since on or about August 22, 2006, maintained an employee manual containing rules that prohibited employees from:

(1) Engaging in behavior designed to create discord or lack of harmony.

(2) Unauthorized soliciting of funds or distributing literature on the Respondent's property.

(e) On February 21, 2007, solicited employees to report to management the union activities of fellow employees and impliedly threatened to discipline employees engaged in those activities.

(f) On January 3, 2008, threatened employees with discharge because of their activities on behalf of the Union.

5. The unfair labor practices set out above in paragraphs 3 and 4, affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent, in no manner other than that specifically found herein, including any other manner alleged in the complaint, has violated the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be ordered to cease and desist therefrom and from any like or related conduct. Having found that the Respondent discharged Glenn Gentz in violation of Section 8(a)(3), it will be ordered to offer him immediate and full reinstatement to his former position of employment or, if that position is no longer available, to a substantially equivalent one without prejudice to his seniority or any other rights or privileges he may have previously enjoyed and make him whole for any loss of earnings and benefits he may have suffered by reason of the Respondent's discrimination against him. Backpay will be computed in accordance with the Board's decision in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for Retarded,* 283 NLRB 1173 (1987). Further the Respondent will be ordered to remove from its files any references to the unlawful discharge and notify Gentz that it has done so and will not use the discharge against him in any way.

Having found that the Respondent imposed a Job Jeopardy Agreement (JJA) on Dave Smith and a 3-day suspension on Ben Balczak, both in violation of Section 8(a)(3), it will be ordered to make them whole for any loss of earnings and benefits they may have suffered and medical expenses Smith may have paid by reason of the Respondent's discrimination against them, and to remove from its files any references to the imposition of the Job Jeopardy Agreement (JJA) on Smith and suspension on Balczak, and notify them that it has done so and that it will not use the discipline against them in any way. Backpay shall be computed as set forth above.

Having found that the Respondent imposed written reprimands/warnings in violation of Section 8(a)(3) on Ben Balczak and Glenn Gentz, it will be ordered to remove any references to the discipline from its files, notify Balczak and Gentz that it has done so, and that it will not use the written reprimands/warnings against them.

It will also be ordered that the Respondent post a remedial notice.

On these findings and conclusions of law, and on the entire record, I issue the following recommended[86]

## ORDER

The Respondent, Ridgeview Industries, Inc., Walker, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their union activities are under surveillance.

(b) Imposing restrictions on employee movement in the plant in response to employees' union activities.

(c) Promulgating, maintaining or enforcing rules prohibiting the posting of materials containing union/nonunion arguments or information on employee bulletin boards, or removing such materials from the bulletin boards.

(d) Promulgating, maintaining, or enforcing rules that prohibit employees from engaging in behavior designed to create discord or lack of harmony, or unauthorized soliciting of funds or distributing literature on company property.

(e) Soliciting employees to report to management the union activities of coworkers and threatening to discipline employees engaged in those activities.

(f) Discharging, or otherwise imposing discipline on employees because of their actual or suspected participation in union activities.

(g) In any like or related manner restraining, coercing, or interfering with employees in the exercise of their Section 7 rights, or discriminating against them in order to discourage membership in a labor organization.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to Glenn Gentz to his former job, or if that job no longer exists, offer him a substantially equivalent position, without prejudice to his seniority and other rights or privileges previously enjoyed.

(b) Make whole Glenn Gentz, Ben Balczak, and Dave Smith for any loss of earnings and other benefits suffered as a result of the discrimination against them, and Smith for any medical expenses he paid as a result of the discrimination against him. Backpay is to be computed as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the discharge and disciplinary warnings/reprimands set forth above of Glenn Gentz, the Job Jeopardy Agreement (JJA) imposed on Dave Smith, and the suspension and disciplinary warnings/reprimands set forth above of Ben Balczak, and notify each of them in writing within 3 days

[86] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

thereafter that this has been done and that evidence of the unlawful actions will not be used against them.

(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Regional Director, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(e) Within 14 days after service by the Region, post at its Three Mile and Northridge facilities copies of the attached notice marked "Appendix."[87] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials. In the event that, during the pendency of the proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its expense, copies of the notice to all employees and former employees of the Respondent at any time since August 22, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 27, 2008

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT impose new restrictions on employee movement in our plants in response to employee union activity.

WE WILL NOT prohibit employees from posting notices, letter, or other nonthreatening materials pertaining to union or protected concerted activities on the plant bulletin boards that are available for other employee uses.

WE WILL NOT promulgate, maintain, or reiterate rules against employees (1) engaging in behavior designed to create discord or lack of harmony, or (2) soliciting during nonwork time such as breaks or before or after their shifts, or (3) distributing literature in nonwork areas during nonworktimes.

WE WILL NOT solicit employees to report to management the union activities of other employees, or threaten to discipline employees engaged in said activities.

WE WILL NOT discharge employees, or issue disciplinary warnings, reprimands, suspensions, Job Jeopardy Agreements (JJA), or other forms of discipline, or restrict movement in our plants because of employees' union activities.

WE WILL NOT in any like or related manner restrain, coerce, or interfere with employees in the exercise of their Section 7 rights, or discriminate against them in order to discourage membership in a union, or activities on behalf of a union.

WE WILL, within 14 days from the date of the order, offer full reinstatement to Glenn Gentz to his former position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Glenn Gentz, Ben Balczak and Dave Smith whole for any loss of earnings and benefits suffered as a result of our discrimination against them, with interest.

WE WILL reimburse Dave Smith for out-of-pocket costs he incurred as a result of our discriminatory imposition of a Job Jeopardy Agreement (JJA), with interest.

WE WILL, within 14 days from the date of this order, rescind the unlawful disciplinary warnings and suspension issued to Ben Balczak, the unlawful Job Jeopardy Agreement (JJA) imposed on Dave Smith, and the unlawful disciplinary warning and discharge of Glenn Gentz, remove any references to such in our files, and advise Balczak, Smith, and Gentz that such has been done, and that the discipline will not be used against them in the future.

RIDGEWAY INDUSTRIES, INC.

[87] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."